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No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SEAFORD, DELAWARE,

Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

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Dated: August 6, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the fifth and fourteenth amendments of the Constitution of the United States require a city operating a municipal electric utility that lawfully takes over the provision of electric service to certain retail customers within its boundaries formerly served by a privately owned utility, to compensate the latter for any taking of its nonexclusive privilege or franchise to serve such customers.

LIST OF PARTIES

All parties to this proceeding before the Supreme Court of the State of Delaware appear in the caption of the case.

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IN THE

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OCTOBER TERM, 1990

No. 90-

CITY OF SEAFORD, DELAWARE,

Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

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The City of Seaford, Delaware, petitioner herein, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Delaware issued on May 8, 1990, and the judgment and order issued on May 24, 1990, in its case No. 165, 1989, entitled *Delmarva Power & Light Company v. City of Seaford.*

OPINION BELOW

The opinion of neither the Delaware Supreme Court nor the Delaware superior court has yet been published in the permanent law reports. The former is unofficially reported as 1990 Del. LEXIS 183 and is reproduced as Appendix A hereto. The latter is unofficially reported as 1989 Del. Super. LEXIS 131

and is reproduced as Appendix B hereto. The Mandate containing the order and judgment of the court is reproduced as Appendix C hereto.

JURISDICTION

At the request of two retail electric customers located in an area annexed by the City of Seaford, the city, through its municipal electric utility, took over the provision of electric service to such customers from Delmarva Power & Light Company ("Delmarva"), a privately owned electric utility that had a nonexclusive franchise to serve in the area. Delmarva brought suit against the city in the state superior court asserting that it is entitled under the federal and state constitutions to compensation for the taking by the city of its franchise to serve the customers. The superior court found that Delmarva's franchise was nonexclusive and that Seaford is legally entitled to provide service to the customers in question, and granted summary judgment for Seaford on the ground that Delmarva is not entitled to compensation.

On appeal, while agreeing that Delmarva's franchise was nonexclusive and that Seaford's actions in taking over the provision of service to the customers were in all respects authorized and proper, the Delaware Supreme Court held under the fifth and fourteenth amendments and their state counterparts that Delmarva is nevertheless entitled to compensation for the taking of the franchise.

The opinion of the Delaware Supreme Court was entered on May 8, 1990, the order and judgment of the court were issued on May 24, 1990, and this petition was filed within 90 days thereafter. The ju-

risdiction of this Court is invoked under 28 U.S.C. § 1257 (1982) in that Delmarva claimed entitlement to compensation under the fifth and fourteenth amendments of the Constitution of the United States, and the Delaware Supreme Court ruled that Delmarva is entitled to compensation thereunder.

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const., amend. V, cls. 4, 5.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . U.S. Const., amend. XIV, § 1, cl. 3.

STATEMENT OF THE CASE

The facts in this case are not in dispute. Seaford is a municipal corporation of the State of Delaware existing under a charter approved by the state legislature which, among other things, authorizes it to annex territory and to provide electric service to customers within one-half mile of its limits. It has operated a municipal electric utility since 1938 and provides electric service to customers both within and outside its boundaries.

Delmarva Power & Light Company is an investor owned electric utility that provides service in the vicinity of Seaford.

In 1981 and 1982 Seaford annexed certain territory within one-half mile of its limits that included properties owned by a church and a country club served by Delmarva. Seaford did not undertake generally to

supplant Delmarva as the provider of electric service in the annexed area but, in 1985 and 1986, at the request of the owners of the church and country club properties, Seaford undertook the provision of electric service to them, thereby displacing Delmarva.

Delmarva filed two complaints against Seaford, subsequently consolidated, in the state superior court, contending that Seaford's assumption of these customers constituted a taking of its franchise for which it was entitled to compensation under the fifth and fourteenth amendments of the United States Constitution and article I, §§ 7 and 8, of the Delaware constitution. Del. Const. art. I, §§ 7, 8. App. 42a, 45a.

Granting Seaford's motion for summary judgment, the superior court held that Delmarva had a nonexclusive franchise to serve the customers in issue; that Seaford also is authorized to serve such customers; and that Delmarva is not entitled under the United States and Delaware constitutions to compensation for the taking of its franchise by reason of Seaford's assuming the provision of service to the customers concerned. App. 33a-34a, 38a-39a.

On appeal by Delmarva, the Delaware Supreme Court agreed that Delmarva's franchise was nonexclusive and that Seaford was authorized to take over the provision of service to the customers. App. 17a, 19a-20a. Nevertheless, after expressing the opinion that *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), is no longer good law, App. 17a, the Delaware court, citing *City of Los Angeles v. Los Angeles Gas & Elec. Co.*, 251 U.S. 32 (1919),[1] ruled that the con-

[1] *City of Los Angeles* involved an undertaking by the city, in aid of the construction of a municipal street lighting system, to

stitutions of the United States and Delaware require that Delmarva be compensated for the taking of the customers. App. 27a. It remanded for further proceedings consistent with its opinion. *Id.*, App. 40a.

REASONS FOR GRANTING THE WRIT

The holding of the Delaware Supreme Court that the fifth and fourteenth amendments require that a privately owned electric utility possessing a nonexclusive franchise to serve certain customers be compensated by a municipal utility that properly takes over the provision of service to such customers, directly conflicts with a number of rulings of this Court and of the United States courts of appeals.[2]

Recognizing that, under the circumstances of this case, its holding that Delmarva is entitled to com-

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remove without compensation the physical facilities of a private company that was providing such lighting under a franchise. The Court held that, while the city was free to assume the provision of street lighting without compensating the private company, it could not compatibly with the fourteenth amendment expropriate the latter's physical facilities without compensation. 251 U.S. at 37 ("[T]he only question is whether the city may, as a matter of public right and without compensation, clear a 'space' for the instrumentalities of its system by removing or relocating the instrumentalities of other systems.")

This case does not involve a claim of taking of any physical facilities.

[2] Conflict with decisions of this Court in relation to a very similar point was the reason for the grant of certiorari in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72, 377 (1974) (city's competing with private garages in the provision of off-street parking while taxing the latter heavily does not constitute taking of property without compensation in violation of due process: citing *Puget Sound Power & Light Co. v. Seattle*,

pensation for being displaced as a provider of services under a nonexclusive franchise, is squarely at odds with this Court's decision in *Tennessee Elec. Power Co. v. TVA, supra,* the Delaware Supreme Court was at pains to show that the holding of that case is no longer the law. App. 16a-17a. But the principle, that the holder of a nonexclusive franchise, whose custom is taken over by a duly authorized enterprise operated by a unit of government, is not entitled to compensation under the fifth or fourteenth amendments, was in place long before *Tennessee* and has been affirmed many times since.

> Further, it has long been settled that the holder of a non-exclusive franchise has no monopoly, and cannot complain of competition from a publicly-created utility system. Phrased another way, the creation by a State of a competing public utility does not amount to a "taking" compensable under the fourteenth amendment. *Newburyport Water Co. v. City of Newburyport*, 193 U.S. 561, 577 (1904) (citations omitted).

Durham v. State of North Carolina, 395 F.2d 58, 60 (4th Cir. 1968). This Court and the federal circuits uniformly enforce this principle.[3]

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291 U.S. 619, 623, 626 [1934] ["the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed."]).

[3] Among the host of cases that might be cited are: *City of Pittsburgh, supra; Puget Sound Power & Light Co., supra; Madera Waterworks v. City of Madera*, 228 U.S. 454, 456 (1913); *Helena Waterworks Co. v. City of Helena*, 195 U.S. 383, 384 (1904); *City of Joplin v. Southwest Missouri Light Co.*, 191 U.S.

The fact that the Delaware court perceived the need to distinguish *Tennessee* shows incidently that it conceived of its ruling as a construction of the requirements of the fifth and fourteenth amendments of the federal constitution and not as an independent construction of the requirements of the state constitution. If the Delaware court had conceived of its ruling as being able to be independently founded on the Delaware constitution, there would have been no need for it to have gone to the effort it did to emasculate *Tennessee*. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). The Delaware courts have often observed that the provisions of the Delaware constitution requiring compensation upon exercise of the power of eminent domain, art. I, §§ 7, 8, though phrased somewhat differently from their federal counterparts, are construed to provide the same rights and guarantees.

150, 156 (1903); *Central Illinois Public Service Co. v. City of Bushnell*, 109 F.2d 26, 29 (7th Cir. 1940); *Porto Rico Ry., Light & Power Co. v. Colom*, 106 F.2d 345, 351 (1st Cir.), *cert. denied*, 308 U.S. 617 (1939); *West Tennessee Power & Light Co. v. City of Jackson*, 97 F.2d 979, 982 (6th Cir.), *cert. denied*, 305 U.S. 625 (1938); *Mississippi Power Co. v. City of Aberdeen*, 95 F.2d 990, 992 (5th Cir. 1938); *see also Mutual Oil Co. v. Zehrung*, 11 F.2d 887, 890 (D. Neb. 1925).

See, e.g., New Castle County School District v. State of Delaware, 424 A.2d 15 (Del. 1980).[4]

Seaford has found no Delaware case suggesting that a person having no right to compensation under the fifth and fourteenth amendments for an alleged taking of property might nevertheless have a right thereto under the relevant provisions of the state constitution. Thus, this Court's correction of the error of the Delaware court on the federal constitutional point would almost certainly put an end to this case because there is no precedent in Delaware for entitlement to compensation under the state constitution in the absence of parallel entitlement under the federal constitution.

Until resolved, the conflict with this Court and the federal courts generally that the Delaware court has created by the subject holding on a point of federal law can be expected to produce highly undesirable consequences. The extension of services by municipal and other publicly owned utilities to customers and areas formerly served by privately owned utilities is

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[4] There the court said:

> Although the federal and State constitutions are stated alternatively, our courts have generally proceeded on the basis that the constitutional guarantees here involved provide the same degree of protection against governmental takings of property without just compensation. Thus, in the context of this case, the federal and the State law questions are essentially one and the same and will be treated as such herein.

424 A.2d at 16. *See also State v. Putnam*, 552 A.2d 1247, 1252 (Del. Super. Ct. 1988) ("The Federal and State Constitutions are held generally to provide the same quantum of protection against uncompensated takings of private property.").

a common and recurring phenomenon in Delaware and around the country. Almost reflexively, displaced utilities claim entitlement to compensation under the fifth and fourteenth amendments for "takings" of their franchises. Whether or not a displaced utility is entitled to compensation under the federal constitution for impairment of a nonexclusive franchise cannot rationally turn on whether the claim is made in a federal court which follows *Tennessee* and its predecessors and progeny or in a state court following the inconsistent "Delaware rule" respecting entitlements under the federal constitution.

In many situations involving both conventional and inverse condemnations, the parties can choose to prosecute or defend in either state or federal court. Here, for example, because Delmarva set up its claims under the fifth and fourteenth amendments, it could have brought the action originally in the federal district court and, Delmarva having brought it in the state superior court, Seaford could have removed it to the United States district court. 28 U.S.C. §§ 1331, 1441 (1982). There can be no question that the latter would have made short work of Delmarva's claim to entitlement to compensation under the federal constitution for interference with a nonexclusive franchise.

Neither can there be any doubt, for several reasons, that the judgment below is final within the intendment of 28 U.S.C. § 1257 (1982). As explained, it is almost certain that this Court's correction of the error of the Delaware court on the point of federal constitutional law will end the case, because Delaware holds the counterpart provisions of the state constitution to mean the same as the federal. *See Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 482-83 (1975)

(Judgment final "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come."). Although judgments in eminent domain actions where the amount of compensation remains to be determined have been cited as examples of judgments that are usually not final for purposes of § 1257, this is because the proceedings remaining to be held may raise additional federal questions. *Id.* at 477 n.6. Here, there is no possibility that the valuation proceedings remaining to be held would tender additional federal issues of any kind. The federal issue has been determined, and the case is, for all practical purposes, concluded. *Id.* at 479.

Also, it is clear that the federal issue decided by the Delaware court (that, under the circumstances, the fifth and fourteenth amendments require the payment of compensation for the "taking" of Delmarva's nonexclusive franchise) will persist and have to be decided regardless of the outcome of the valuation proceedings. *Id.* at 480; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277-79 (1980).

Finally, no further review of the Delaware court's ruling on the federal constitutional point may be had regardless of the outcome of further proceedings on valuation in the state courts. Were it, for example, to be determined as a matter of fact in the superior court that Delmarva's nonexclusive franchise is without value, Seaford would have no grounds for appeal to the Delaware Supreme Court and no right to re-

consideration of the federal constitutional issue upon an appeal by Delmarva. On the other hand, were Seaford, for instance, to challenge as improper elements of value awarded in further proceedings, it could not on appeal to the Delaware Supreme Court obtain reconsideration of the court's prior decision on the federal constitutional point. *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160 (Del. 1978). In these circumstances, this Court takes jurisdiction notwithstanding that further proceedings are contemplated in the state courts. *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973).

CONCLUSION

The judgment of the Delaware Supreme Court to which this petition is directed comprises a holding on a point of federal constitutional law that is in direct conflict with settled rulings of this Court and the federal courts of appeals and which, until corrected by this Court, can be expected to cause confusion and produce incongruous outcomes. For the reasons set forth above Seaford respectfully submits that certiorari should be granted.

Respectfully submitted,

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Dated: August 6, 1990

APPENDIX

APPENDIX A
IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 165, 1989

DELMARVA POWER & LIGHT COMPANY,
Plaintiff Below-Appellant,

v.

CITY OF SEAFORD,
Defendant Below-Appellee.

Court Below—Superior Court of the State of Delaware, in and for New Castle County: C.A. Nos. 86C-JA-57, 87C-FE-118

Submitted: October 17, 1989
Decided: May 8, 1990

Before CHRISTIE, Chief Justice, MOORE, Justice, and BERGER, Vice Chancellor (sitting by designation pursuant to Del. Const. art. IV, § 12).

Upon appeal from Superior Court. REVERSED.

Richard E. Poole, Esquire, and Gregory A. Inskip, Esquire (argued), Potter, Anderson & Corroon, Wilmington; Dale G. Stoodley, Esquire, Wilmington, for Appellant.

James A. Fuqua, Jr., Esquire, City Solicitor, Seaford; Frederick L. Miller, Jr., Esquire, and Janice L. Lower, Esquire (argued), Duncan, Weinberg, Miller & Pembroke, P.C., Washington, D.C., Of Counsel, for Appellee.

CHRISTIE, Chief Justice:

This is an appeal from a grant of summary judgment in favor of the appellee, City of Seaford (Seaford). The Superior Court held that there were no material issues of fact in dispute and that the appellant, Delmarva Power & Light Company (Delmarva), was not entitled to a claim for inverse condemnation as a matter of law when two of its customers changed their electrical service to Seaford's municipal utility after the property on which they were located was annexed by Seaford.

The parties agree on the facts which gave rise to this dispute, and we will recite the Superior Court's summary from its opinion. Delmarva is a Delaware corporation engaged in the business of selling electric power to wholesale and retail customers. Seaford is an incorporated city and a municipal corporation of the State of Delaware operating under a home rule charter. Seaford operates its own electric utility company, Seaford Light & Power Company (Seaford Power), primarily for the purpose of selling electricity to private and commercial residents of Seaford.

Until December of 1985, Delmarva sold electric power at retail to the Seaford Wesleyan Church and Parsonage (the Church) located at 13 North Front Street. These properties have been within Seaford's municipal limits since 1981, having been properly annexed by the city in August of that year. At the request of the Church in August, 1985, Seaford took steps to provide service to these properties as customers of Seaford Power. The Church requested that Delmarva cease service, and the change took place on December 5, 1985.

Until November 10, 1986, Delmarva sold electric power at retail to the Seaford Golf and Country Club (Country Club) located on West Locust Street. This property was annexed by Seaford on January 25, 1982. On May 7, 1986, the Country Club informed Delmarva that it wished to change service from Delmarva to Seaford Power, and this was accomplished on November 10, 1986.

Delmarva filed a complaint against Seaford claiming that there had been inverse condemnation of its service account with the Church which it held pursuant to franchises which were granted to Delmarva by the State of Delaware and its agent, Sussex County Levy Court. Thereafter, Delmarva filed a second complaint based on the change in service by the Country Club. Both complaints charged that Seaford had appropriated property rights of Delmarva without instituting formal condemnation proceedings. It was alleged that Seaford's action in taking over these accounts amounted to a taking for public use without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, sections seven and eight of the Delaware Constitution. The complaints were consolidated in Superior Court pursuant to Superior Court Civil Rule 42(a).

After considering the evidence in the light most favorable to Delmarva, the Superior Court concluded that Seaford was not required as a matter of Delaware law to compensate Delmarva for a taking of its property interest in the accounts in question. The court held that *both* of the parties possessed valid franchises to serve these customers, but that Seaford Power's franchise prevailed because Delmarva's franchise was limited by the municipal power granted to the city of Seaford. The Superior Court ruled that once Seaford adopted its home rule charter in 1961, the political duties and powers which it assumed within the city limits, including areas later annexed, extinguished any franchise rights of Delmarva which conflicted with those of Seaford Power. The court also found it significant that the customers chose to switch service to Seaford Power and were not forced to do so. We disagree with this conclusion, and for the reasons stated herein, we reverse.

The standard of review for an appeal from a grant of summary judgment is whether the court below committed an error of law. *duPont v. duPont*, Del. Supr., 216 A.2d

674, 680 (1966). The Court may review the controversy *de novo*, including all pleadings, evidence, and all portions of the record below, as well as the opinion and decision of the lower court. *Bershad v. Curtiss-Wright Corp.*, Del. Supr., 535 A.2d 840, 844 (1987). The facts leading to the controversy must be reviewed in the light most favorable to the appellant, the non-moving party below. *Alexander Indus., Inc. v. Hill*, Del. Supr., 211 A.2d 917 (1965). A motion for summary judgment "must be denied if there is any reasonable hypothesis by which the opposing party may recover." *Vanaman v. Milford Memorial Hosp., Inc.*, Del. Supr., 272 A.2d 718, 720 (1970).

I.

The appellant, Delmarva, argues that it possesses an exclusive franchise granted to it by the State of Delaware. The exclusivity of this franchise, it is argued, is based on a combination of factors including a) the authority granted to it by statute, b) the terms of a franchise grant from Sussex County, and c) the fact that Delmarva is regulated by the Public Service Commission. Delmarva contends that because it owns an exclusive franchise, it owns a vested property right which cannot be usurped by a governmental entity without compensation. *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 72, 33 S.Ct. 988, 993, 57 L.Ed. 1389 (1913).

A franchise is a right or privilege conferred by the state to a grantee, usually for the provision of some public purpose. *Blair v. Chicago*, 201 U.S. 400, 26 S.Ct. 427, 439, 50 L.Ed. 801 (1906); *Greater Wilmington Transp. Auth. v. Kline*, Del. Super., 285 A.2d 819, 822 (1971). Because of this public purpose, any ambiguity regarding the nature of this grant must be construed strictly against the donee. *Knoxville Water Co. v. City of Knoxville*, 200 U.S. 22, 50, 26 S.Ct. 224, 227, 50 L.Ed. 353 (1906). In particular, exclusivity is not favored and will only be recognized if it is explicit in the terms of the franchise. *Pearsall v. Great*

Northern Ry. Co., 161 U.S. 646, 664, 16 S.Ct. 705, 709, 40 L.Ed. 838 (1896). Thus, we must look to the original franchise grant to Delmarva to determine its exact nature.

Delmarva contends that its right to serve customers in Sussex County was established initially by statute. In 1899, the Delaware General Assembly passed the original version of what is now 26 *Del.C.* §§ 906, 907.[1] This statute confers

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[1] 26 *Del.C.* § 906. *Powers and duties of electric utility corporations; regulation of use of public roads, streets, etc.*

(a) Every corporation organized under Chapter 1 of Title 8 for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, in addition to the powers conferred upon corporations generally, may use the public roads, highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures. The consent of the council, town commissioners or other persons having control over the public roads, highways, streets, avenues and alleys of the city, town and district in or upon which the posts or poles are to be erected shall first, and as a condition precedent, be obtained.

(b) No posts or poles shall be erected in any street of any city or incorporated town except in those streets which are designated by the authorities thereof and then only in such place and manner as is thus designated, and the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the streets, highways and roads. The use of the public streets in any of the cities and incorporated towns of this State shall be subject to such regulations and taxation as may be first imposed by the corporate authorities of such cities and towns.

(c) No posts or poles shall be erected upon the soil or property of any person without first obtaining the consent in writing of the owner of the soil or property.

(d) Any wire crossing a railroad shall not be at a less elevation than 23 feet.

§ 907. *Laying pipes, conduits or wires by electric utility corporations.*

Every corporation mentioned in § 906 of this title may lay pipes, conduits or wires beneath the public roads, highways, streets, avenues and alleys as it deems necessary. The pipes, conduits and wires shall

a broad grant of authority to public utilities to use public roads as conduits for providing electrical service. This Court has held that the statute grants a general authority or franchise to companies such as Delmarva. *Eastern Shore Pub. Serv. Co. v. Town of Seaford*, Del. Supr., 2 A.2d 265, 268 (1938), *appeal dismissed*, 306 U.S. 616, 59 S.Ct. 483, 83 L.Ed. 1023 (1939). In order for public utilities to operate within the boundaries of municipalities, the statute requires that they must first obtain the consent of the municipality as a condition precedent to entering and serving inside the municipal territory. The municipality may impose reasonable restrictions on this franchise, including limiting its duration. *Id.* By its language, however, the franchise granted by this statute is not exclusive as to other public utilities or as to municipal utilities.

In 1900, a predecessor of Delmarva received a specific franchise grant from the Levy Court of Sussex County. The grant conferred to Delaware Electric Company the right to "use the streets and highways of Sussex County for the purpose of erecting poles or carrying wires . . . for transmitting electricity."[2] The county retained the general

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be laid at least 2 feet below the surface of the same and shall not in any way unnecessarily obstruct or interfere with public travel or damage public or private property. No public streets shall be opened for such purpose without the consent of the counsel of any city, or the town commissioners of any incorporated town, or other persons having control over the public roads, highways, streets, avenues and alleys. Such use of the public streets in any of the cities and towns of this State shall be subject to such regulations, taxation and restrictions as may be first imposed by the corporate authorities of such cities and towns.

[2] The complete text of this grant states:

Be it resolved by the Levy Court of Sussex County at the July Session A.D. 1900, that THE DELAWARE ELECTRIC COMPANY its successors and assigns, be and the same is hereby authorized to use the Streets and Highways of Sussex County for the purposes of erecting poles for carrying wires, and the placing of wires on the same, for transmitting electricity for light, heat and power, or for building

authority to regulate the location and installation of poles and wires so as to not "interfere with or hinder the public in the use of said Streets or Highways." *See* n.2. The grant did not refer to the duration of this use, its revocability, or its exclusivity.

In 1901, Delaware Electric Company was succeeded by Laurel-Seaford Electric Light Company which, pursuant to the grant, erected poles and provided electrical services inside Seaford. *Eastern Shore*, 2 A.2d at 267. It operated under a five-year contract with Seaford, which was negotiated in 1907. In 1909 it sold its business, including its franchises and other rights, to Sussex Light and Power Company. This company continued to service Seaford and it entered into a second five-year contract in 1911. In 1915, the power company requested that Seaford pass an ordinance granting it permission to continue to operate in Seaford for twenty years, and Seaford agreed and adopted such an ordinance. Sussex Light and Power Company was sold to an entity which in 1935 was supplying power to

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and maintaining of subways for the transmitting electricity for light, heat and power.

PROVIDED that all poles placed by the said Company on the Streets or Highways of the said County shall be placed or set on the extreme side limit of the said Streets or Highway and in all cases where the wires of the said Company shall cross the said Streets or Highways they shall be placed at such a distance from the ground as not to interfere with or hinder the public in the use of the said Streets or Highways.

AND PROVIDED FURTHER that all subways built by said Company uponnthe [sic] Streets or Highways of the said County shall be built under and along the extreme side limit of the said Streets or Highways, and in all cases where the wires of said Company cross the said Streets or Highways the said Subways shall be run directly across said Streets or Highways and at such depth that the same shall not interfere with or hinder the public in the use of said Streets or Highways.

July 10, 1900

Seaford under the ordinance as Eastern Shore Public Service Company (Eastern Shore). When the twenty-year ordinance period expired, Seaford did not renew it. Instead it withdrew its consent and passed an ordinance directing Eastern Shore to remove its poles, wires, and fixtures from the Seaford city limits. *Id.* Eastern Shore contested this action by Seaford, but the Court of Chancery held that since the consent given in 1915 had expired, the city could cause the removal of the company's property from its streets. *Town of Seaford v. Eastern Shore Pub. Serv. Co.*, Del. Ch., 191 A.2d 892, 899 (1937). In 1936 Seaford granted a twenty-year franchise to a new company, Seaford Light & Power Company. By the terms of the resolution of the town council, that franchise was nonexclusive, and Seaford had the option to purchase that electric company within five years. *Id.* at 895. Seaford did in fact exercise that option, and it has operated its own municipal utility within its city limits since 1938.

In 1930, Eastern Shore was granted a "right" to erect and maintain poles, and to string wires over and along all roads and highways within the limits of Sussex County over which the Levy Court had jurisdiction.[3] Appellee,

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[3] The complete text of the grant states:

BE IT RESOLVED by the Levy Court of Sussex County, Delaware, that the right, revocable at the pleasure of the Levy Court, to erect and maintain poles and to string wires thereon, be and the same hereby is granted to and vested in Eastern Shore Public Service Company, a corporation of the State of Delaware, its successors and assigns, over and along all roads and highways within the limits of Sussex County over which the said Levy Court of Sussex County has jurisdiction, and provided that all such poles and wires be erected and located on the extreme side of such County Roads so as in nowise to interfere with the free and unimpeded use of said County roads for vehicular or other traffic.

BE IT FURTHER RESOLVED that whenever said Eastern Shore Public Service Company desires or proposes to erect poles and string its wires along any of the County roads under the jurisdiction of the

which succeeded to Eastern Shore's interests, points to this grant as an additional source of its exclusive franchise. This document refers to the grant's revocability and describes no duration. It makes no reference to it being exclusive. Under this and the prior grant, however, as well as its authority granted by statute, Delmarva has continued to provide electrical service in Sussex County outside of Seaford's municipal boundaries since 1937.

To summarize the first fifty years of Delmarva's franchise, a general authority to operate was granted initially to all public utilities by statute, but limited by requiring the consent of municipalities in which they operated. An authority to use the county highways as conduits was granted directly to a predecessor of Delmarva by the Sussex County Levy Court in 1900. A second grant to another predecessor took place in 1930. The history of the dispute with Seaford reveals that the municipality was able to limit this franchise by circumscribing its consent for the exercise of the franchise within its boundaries to a duration of twenty years. Delmarva was ordered by the Court of Chancery to cease service inside Seaford after November 30, 1937. While Delmarva is the only public utility providing electrical service to the areas bordering Seaford, and it possesses a valid franchise to do so, it cannot be said that by the terms of its franchise it possesses exclusive rights to that area.

In 1949 Delmarva became subject to regulation by the Public Service Commission of Delaware (the Commission). Delmarva argues that this regulation elevates the status of its franchise to an exclusive one. The Public Utilities Act of 1974 (the Act), the statute which governs the facts

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Levy Court of Sussex County, notice of its intention so to erect poles and string wires shall be given to the County Engineer of Sussex County, and all poles so to be erected on and along said County roads shall be erected under the supervision and according to the instructions of the County Engineer of Sussex County.

of this case, requires that public utilities must obtain a certificate of public convenience and necessity to begin or extend their operations. 26 *Del.C.* § 203A (a).[4] Additionally, a public utility may not cease operations or service without approval of the Commission. 26 *Del.C.* § 203A(c)(1).[5] Delmarva contends that Delaware courts have described such regulation as creating "a legalized monopoly." *Diamond State Tel. Co. v. Pub. Serv. Comm'n*, Del. Supr., 367 A.2d 644, 646 (1976). It then asserts that the status of being a legalized monopoly by virtue of regulation is the same thing as having an exclusive franchise. Del-

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[4] 26 *Del.C.* § 203A *Certificate of public convenience and necessity; abandonment or discontinuance of business, operations or service.*

> (a)(1) Subject to the provisions of subsection (b) of this section and §§ 102, 201 and 202 of this title, no individual, copartnership, association, corporation, joint stock company, agency or department of the State, cooperative, or the lessees, trustees or receivers thereof, shall begin the business of a public utility nor shall any public utility begin any extension of its business or operations without having first obtained from the Commission a certificate that the present or future public convenience and necessity requires or will require the operation of such business or extension.
>
> (2) This section shall not be construed to require any public utility to secure such a certificate for any extension within the perimeter of any territory already served by it.
>
> (3) The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity.

[5] This section was approved July 13, 1983, 64 Del. Laws, c. 150, § 1.

> 26 *Del.C.* § 203A(c)(1) No public utility shall abandon or discontinue, in whole or in part, any business, operations or services provided under a certificate of public convenience and necessity or otherwise which are subject to jurisdiction of the Commission without first having received Commission approval for such abandonment or discontinuance.

marva also argues that by virtue of its regulation by the Public Service Commission, it is obligated to serve all customers at regulated rates in return for protection from competition. This results in Delmarva having the exclusive right and duty to serve the two customers in this case. This exclusive right constitutes a vested property right, Delmarva contends, for which it should have been compensated when Seaford appropriated the customers. *City of Jackson v. Creston Hills, Inc.*, Miss. Supr., 172 So.2d 215 (1965); *Town of Coushatta v. Valley Elec. Mem. Corp.*, La. App., 139 So.2d 822 (1961).

The appellee, Seaford, contends that the Public Service Commission is not empowered by the legislature to grant franchises to public electric utilities such as Delmarva, and that the certificate of public convenience and necessity does not confer a property right.[6] Because this is the case, Seaford argues, Delmarva possesses only a non-exclusive franchise which is not a vested property right, but one which can be lost as a result of competition. The appellee cites a Delaware Superior Court case which interprets the certificate to be merely a license and not a franchise. *Greater Wilmington Transp. Auth. v. Kline*, Del. Super., 285 A.2d 819, 823 (1971). In the *Kline* case, the Superior Court analyzed the role and powers of the Public Service Commission as described by the statute then in force. 26 *Del.C.* § 162 (essentially the same language as now appears in 26 *Del.C.* § 203A(a)). It held that the Commission was "essentially a regulatory body which performs certain legislative functions where specifically authorized by statute."

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[6] The appellee points out that Delmarva does not even hold such a certificate, because it began operations in the contested territory before the statute was passed, and is thus exempted from that requirement unless it extends the geographic area in which it provides service. 26 *Del.C.* § 203A(a)(2). While this may be the case, there is nothing to indicate that Delmarva is not subject to the same rights and obligations under this regulatory statute as a utility which actually holds a certificate.

Kline, 285 A.2d at 822 (1953). With regard to a certificate of convenience and necessity for bus routes, the court held that it was "a mere license that can be amended or revoked at will by the grantor. Such being the case it is personal in its character, is not transferable and does not pass by succession. It is purely a regulatory measure that vests no right in the holder." *Id.* at 823; *accord, Highfield Water Co. v. Pub. Serv. Comm.*, Md. App., 416 A.2d 1357 (1980).

Delmarva points to a distinction made in *dicta* by the court in the *Kline* case between the powers of the Commission over bus routes and its powers regarding electric utilities such as Delmarva. Addressing that point, the court stated that the legislature had given the Commission the authority to grant franchises to those utilities referred to in 26 *Del.C.* §§ 906, 907, because

> [t]he inherent requirement in those industries for high intitial capital outlay of a permanent nature dictates that for the protection of the public service company and consequent maintenance of service that the legal relationship between sovereign and company be framed in terms of a mutually binding contract or franchise.

Kline, 285 A.2d at 822-23 (citing *Penn-York Natural Gas Corp. v. Maltbie*, 164 Misc. 569, 299 N.Y.S. 1004 (1937)). Our previous decisions indicate that by enacting 26 *Del.C.* §§ 906, 907, the General Assembly intended for the State to confer franchises to companies such as Delmarva. *See Eastern Shore Pub. Serv. Co. v. Town of Seaford*, Del. Supr., 2 A.2d 265 (1938), *appeal dismissed*, 306 U.S. 616, 59 S.Ct. 483, 83 L.Ed. 1023 (1939). However, to the extent that *dicta* in the *Kline* case indicates that this statute confers authority to the Commission to grant franchises to such utilities, we do not view that *dicta* as persuasive in this case. We hold that, inasmuch as a franchise constitutes a contractual relationship between the sovereign

grantor and a public utility grantee, the Commission regulates that relationship on behalf of the grantor. There is no question that the grantee's obligations resulting from this contract can involve enormous expense and permanent investment. In this regard, once a franchise is granted, the grantee possesses a private right which will be protected by the sovereign according to the terms of the franchise. This describes the contractual aspect of a franchise, but franchises have a dual character in that they involve services which are public in nature. In this regard the grantee may be burdened by the sovereign in order to meet the needs of the public. *See* 36 Am. Jur. *Franchises* § 4 (1968); *Knoxville Water Co. v. City of Knoxville*, 200 U.S. 22, 26 S.Ct. 224, 50 L.Ed. 353 (1906). We find the holding of the *Kline* case to be correct insofar as it is indicated in that opinion that under the statute a certificate of convenience and necessity represents a function of regulation by the Commission, and the certificate in and of itself does not confer or represent an exclusive property right. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 141, 59 S.Ct. 366, 371, 83 L.Ed. 543 (1939); *contra, Town of Culpeper v. Va. Elec. and Power Co.*, Va. Supr., 207 So.2d 864 (1974). The certificate is a creature of the Commission and operates only to define the rights among these utilities which are subject to Commission regulation.

We agree with appellee Seaford that Delmarva does not possess an exclusive franchise from the State of Delaware strictly by virtue of its being regulated by the Public Service Commission. The General Assembly has indicated this intent in the Act defining the powers and jurisdiction of the Commission. Public utilities are defined in the statute to include electric and gas providers such as Delmarva. 26 *Del.C.* § 102(2). Such a public utility shall not begin or extend any of its operations without first obtaining "a certificate that the present or future public convenience and necessity requires [such an action]." 26 *Del.C.*

§ 203A(a)(1) (*see* n.4). Through this certification authority, the General Assembly intended to "balance the interests of the consuming public and of the regulated public utilities." 59 Del. Laws, c. 397, § 1 (Statement of purpose). In its discretion the Commission is empowered to "define or limit the territory or territories in this State within which the activities authorized by the certificate may be conducted." 26 *Del.C.* § 203A(b)(3). This limitation of competition results in a regulated monopoly of one public utility per area. It reflects a policy that is "the product of many years of unhappy experience with the evils of uncontrolled monopoly, and the resulting ills visited on the public by speculative schemes, unwarranted competitive practices, and unsatisfactory service." *City of Dover v. Del. Power & Light Co.*, Del. P.S.C., 3 P.U.R.3d 181, 191 (1953). The statute does not refer to this certificate as a franchise, however, and it appears to this Court that this was not intended to be a franchise.[7]

Two decisions by the Commission shed light on the standards that are applicable to granting a certificate and in doing so, articulate the public policy of this State. In the first case, Delmarva sought and was denied a certificate to supply electricity to the Dover Air Force Base. *City of Dover v. Del. Power & Light Co.*, Del. P.S.C., 3 P.U.R. 3d 181 (1953). The Commission ruled that because the city of Dover had been providing electricity to the base in the past, the Commission would follow a policy of protecting the "pioneer utility" unless its services were

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[7] In another section of the Act, the legislature explicitly conferred power upon the Commission to grant franchises to cable television systems that desire to operate outside the boundaries of municipalities which may also grant franchises. 26 *Del.C.* § 601(a). The subchapter details the procedures, rights, and obligations of the franchisor and franchisees. We find it significant, given the argument raised by appellant, that the legislature did not grant a similar franchising power to the Commission for public utilities other than cable television systems.

proven to be inadequate or unsatisfactory. This principle will prevail unless it can be shown that the convenience and necessity of the public as a whole will require competition. *Id.* at 191. In the second case, the Commission applied the same principle of protection for the "pioneer utility" to deny Delmarva a certificate to serve Mallard Lakes, a townhouse development in Sussex County. *In the Matter of the Application of Delmarva Power & Light Co. for a Certificate of Public Convenience and Necessity to Provide Electrical Service to Mallard Lakes*, Del. P.S.C., Dkt. 84-20, Crosse, Hearing Examiner (July 12, 1985), *aff'd*, Del. P.S.C., Order No. 2685 (November 5, 1985). In that case, the Commission stated that "it is the policy of this state to protect the pioneer utility or prevent competition by preventing needless duplication of facilities. However, where it can be shown that the public convenience is served by permitting competition, competition will be allowed." *Id.* These holdings properly articulate the public policy of this State.[8]

Delmarva argues that by virtue of the certificate of necessity and public convenience, it owns an exclusive franchise. The public policy of the State supports this assumption as to other public utilities which are also regulated by the Commission. To that extent, the certificate constitutes a valuable property right, which cannot be taken from it without due process of law. *Union Rural Elec. Assoc., Inc. v. Town of Frederick*, Colo. Supr., 670 P.2d 4, 8 (1983). The cases summarized above demonstrate that only when the Commission is persuaded that the utility is providing inadequate or unsatisfactory service will

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[8] Subsequent to the decision in *Mallard Lakes*, the General Assembly adopted 26 *Del.C.* § 203B, which authorizes the Public Service Commission to establish service territories. The amendment became effective on June 19, 1987, and for that reason is not applicable to this case. It does not appear to this Court, however, that the amendment changes the public policy of this State or the role of the Commission as described in this opinion.

it impair the utility's use of the certificate. The Commission is the exclusive arena for disputes of this sort among public utilities. 26 *Del.C.* § 203A(a)(3).

On the other hand, the Public Service Commission has no jurisdiction over municipal utilities such as the one owned by Seaford. 26 *Del.C.* § 202(a).[9] Thus, the exclusivity warranted by the certificate operates only to protect Delmarva from competition from other regulated utilities, not municipal utilities such as Seaford Power. The statute granting authority to the Public Service Commission explicitly limits its authority and thus the protection it can afford holders of its certificates. *In Re Delaware Power & Light Co.*, Del. Super., 99 A.2d 270, 273 (1953). Contrary to Delmarva's argument, the certificate of public necessity and convenience does not operate as an exclusive franchise against Seaford. It does, however, confer other valuable property rights.

The United States Supreme Court addressed the relative rights of utilities which hold non-exclusive franchises subject to regulation by state agencies in 1939. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939). In that case, the Court held that owners of non-exclusive franchises which lost business due to competition from the federally-owned Tennessee Valley Authority (TVA) had no standing to sue, because their loss was "damnum absque injuria,—a damage not consequent upon the violation of any right recognized by law." *Id.* at 137, 59 S.Ct. at 369, 83 L.Ed. 543. The Court also stated that "[t]he local franchises, while having elements of property, confer no contractual or property right

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[9] 26 *Del.C.* § 202. *Limitations on jurisdiction of Commission.*

(a) The Commission shall have no supervision or regulation over any public utility or over the rates, property, property rights, equipment, facilities, service territories or franchises of any public utility that is municipally owned or any municipal electric company formed pursuant to Chapter 13 of Title 22.

to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise." *Id.* at 139, 59 S.Ct. at 370, 83 L.Ed. 543. Seaford argues that this decision supports its position that Delmarva's non-exclusive franchise cannot prevent uncompensated losses due to competition. While the Supreme Court has never overruled its holding in this case, it has broadened the requirements for standing, and it is likely that the Court would hold today that the rights that the public utilities did own were sufficient to support standing to sue for damages against losses incurred by the creation of the TVA. *See Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). More significantly, the statute creating the TVA was amended in 1959 to prohibit the TVA from expanding its service areas. This represented an apparent effort to protect the business of the remaining public utilities. *Hardin v. Ky. Util. Co.*, 390 U.S. 1, 2, 88 S.Ct. 651, 653, 19 L.Ed.2d 787 (1968). Thus, Congress limited the competition among utilities in the TVA markets and provided a statutory basis for standing for holders of non-exclusive franchises. Inasmuch as this 1939 United States Supreme Court decision describes owners of non-exclusive franchises operating under certificates of public necessity and convenience as having no compensable rights, we deem that ruling to be limited to the particular procedural posture and facts of that case. We do not regard it as authority for defining the property rights of the parties in this case.

After examining each of the sources of its franchise propounded by the appellant, we concur with the finding of the Superior Court that Delmarva owns a non-exclusive franchise in Sussex County. This franchise derives from statute and from grants from the Sussex County Levy Court in 1900 and 1930. These grants do not explicitly confer an exclusive right to be free from competition from other utilities. As a public utility, the statute authorizes

it to use public roads as conduits for electrical service, subject to the consent of municipalities in which it operates. 26 *Del.C.* §§ 906, 907. Delmarva is regulated by the Public Service Commission, but this regulation does not in and of itself grant a franchise. The Commission is authorized, however, to promote the State's policy of restrictive competition for customers among regulated public utilities by using the regulatory device of the certificate of public necessity and convenience. 26 *Del.C.* § 203A. Additionally, while the Commission may restrict competition among utilities over which it has jurisdiction, it is prohibited from exercising jurisdiction over municipal utilities such as Seaford Light & Power Company. 26 *Del.C.* § 202. The fact that Delmarva enjoys an exclusive right to serve certain of its customers by virtue of its regulation by the Commission does not establish that Delmarva has a corresponding exclusive right to serve properties located in Seaford. The combination of the franchise and the certificate, however, constitutes a property right as to customers served by Delmarva, which cannot be taken without due process.

II.

Seaford claims that by virtue of its authority as the municipality within which the properties are situated, its right to serve the two customers supersedes any non-exclusive franchise rights which Delmarva had when the city limits were extended. When Seaford adopted a new city charter in 1961, it argues, Delmarva knew that Seaford obtained additional authority with regard to the area within the city or within one-half mile of its borders. Thus, Delmarva became subject to the risk that it would lose its franchise for those customers in the future, and any loss which it has suffered was a business loss due to competition and preference of the customers and was not a compensable taking.

To analyze the merits of this argument, we must examine the nature of Seaford's rights and powers as conferred by the laws of Delaware, much as we have done in determining Delmarva's rights. The Town of Seaford originally had authority to "provide lamps and to light the streets and public places of every description in said town." 29 Del. Laws c. 153 § 19 (March 1, 1917). This provision allowed Seaford to grant franchises for that purpose, and it did grant a twenty-year franchise to Delmarva's predecessor in 1915. On September 8, 1936, Seaford withdrew its consent from that company and granted a non-exclusive franchise to Seaford Light & Power Company for twenty years. *Simon v. Town of Seaford*, Del. Supr., 197 A. 681, 683 (1938). Seaford exercised its option to purchase that company and has operated it as a municipally-owned utility within its borders since October 15, 1938. *Town of Seaford v. Eastern Shore Pub. Serv. Co.*, Del. Super., 24 A.2d 436, 440 (1942). In 1961, the Delaware General Assembly authorized a new home rule charter (the Charter) for Seaford which included the authority to provide electrical service to communities within one-half mile of its city limits.[10] This

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[10] Section 32 of the Charter authorizes Seaford:

> To contract with or to grant franchises, concessions or rights of any person, persons, firm, partnership or corporation who may apply for . . . the use of any street, highway, avenue, lane, alley or other City property, for the construction and operation of . . . electric light power and water plants and distribution system. To make and establish rules and regulations, by ordinance or resolution, for the manufacture and sale of electric current, including the establishment of a service charge, in said City and *within one-half mile of the Corporate limits thereof* (emphasis supplied).

Additionally, section 35(G) of Seaford's Charter states:

> In the event the City of Seaford should construct or acquire any plant, machinery, appliances or equipment for the supply of electricity or gas for light, heat or power purposes, authority is hereby granted the City of Seaford to furnish

Charter also granted Seaford the authority to annex new territory. 53 Del. Laws c. 42. Both the Church and the Country Club were located within this one-half mile area, and the lands which they occupy were annexed by the city in 1981 and 1982 respectively. The record reveals that the change in service in 1985 and 1986 was not the result of any coercion by Seaford, nor has Seaford sought to prevent Delmarva from continuing to provide service to its other customers within the annexed territory.

Seaford has contended in its brief and at oral argument that its right to provide electrical service outside of its boundaries functioned to extinguish Delmarva's franchise to serve the contested customers. The alleged effective date of this extinction was May 5, 1961, the date upon which the Charter was approved by the General Assembly. Delmarva was on notice at that point, it is argued, that its continuing service to the customers within one-half mile of Seaford was now subject to the right of Seaford to expand and to provide utility services in that area. The Superior Court adopted this position in its grant of the summary judgment motion. We believe that this view insofar as it deprives Delmarva of the right to compensation for loss of existing customers is contrary to the law governing municipal corporations and prior decisions of this Court.

The Superior Court relied on a North Carolina Supreme Court case, *Stillings v. City of Winston-Salem*, N.C. Supr., 319 S.Ed.2d 233 (1984); *accord, City of Estacada v. Am. Sanitary Serv.*, Or. App., 599 P.2d 1185 (1979). In that case, three garbage collection businesses had been granted exclusive five-year franchises by Forsyth County to provide

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electricity or gas for light, heat or power purposes to the outlying communities provided that *this authority shall not exceed a distance of One-half Mile beyond the limits of said City* . . . and to do all things necessary to carry out this authority (emphasis supplied).

their services in certain areas which were outside the city limits of Winston-Salem. During that five-year period, Winston-Salem annexed portions of the areas served by the franchisees and, pursuant to statute, began to furnish free garbage collection to the residents of those areas. Although there was no claim that Winston-Salem interfered with or obstructed the private companies in any way, their businesses diminished because their customers chose the city's free service. The private companies sued the city for inverse condemnation, contending that the value of their franchises had been so impaired as to constitute a taking for which they were owed compensation. The court held that no taking had occurred. *Id.* at 237. It determined that the franchises were a function of the authority and power of the sovereign which granted them. Because the county only had authority over territory which was outside the boundaries of cities, the franchises were granted necessarily subject to changes of those boundaries. The franchise to serve territory incorporated by the city could not be protected by the county and, therefore, was no longer valid. For this reason, the property rights of the exclusive franchisees were extinguished in those annexed territories. The court also stated that as long as the city had not passed an ordinance to the contrary, the garbage companies were free to compete with the city in those territories if they chose. *Id.* at 238. *See also, Calcasieu Sanitation Serv. v. City of Lake Charles*, La. App., 118 So.2d 179 (1960).

We find this case to be distinguishable for two reasons. To begin with, the franchises originally granted to Delmarva were not limited to territory only outside the city limits. The franchisor was the State of Delaware. To the extent that the franchises were limited, they were limited by the requirement that a utility may not operate within a municipality without its consent. 26 *Del.C.* §§ 906, 907. Neither of the grants of 1900 and 1930 which were granted by Sussex County, limited the territory in which the utility

could operate. As the history recounts, the predecessors of Delmarva operated inside the City of Seaford until 1938. At that time, this Court held that the consent provisions of the statute empowered the city to limit the duration of the use of a franchise inside its boundaries. *Eastern Shore Pub. Serv. Co. v. Town of Seaford*, Del. Supr., 2 A.2d 265, 268 (1938), *appeal dismissed*, 306 U.S. 616, 59 S.Ct. 483, 86 L.Ed. 1023 (1939). Only because the twenty-year period for which consent had been granted had expired could the city legitimately compel Delmarva's successor to leave its municipal territory. *Id.* at 267.

Seaford argues that in 1961, when it became empowered to expand its borders, Delmarva's franchise rights were extinguished. The home rule powers of Seaford are those of a sovereign, it is argued, and effectively give it the power to revoke any franchise granted by the State which was to be exercised within its territory, or even within one-half mile of its borders. 22 *Del.C.* § 802;[11] *See Dunn v. Mayor of Wilmington*, Del. Supr., 219 A.2d 153 (1966). This authority to serve outside its boundaries, it is argued, is in addition to its governmental power to annex. 22 *Del.C.* § 101.

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[11] 22 Delaware Code § 802. *Applicability of chapter; grant of power.*

> Every municipal corporation in this State containing a population of at least 1,000 persons as shown by the last official federal decennial census may proceed as set forth in this chapter to amend its municipal charter and may, subject to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute. This grant of power does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a felony.

Public utilities in Delaware are able to operate within city limits as long as they have the permission of the municipality. 26 *Del.C.* §§ 906, 907. That this is the law and the intent of the General Assembly since its enactment in 1899 is clear. There is nothing to indicate that the powers granted to home rule cities are deemed to supersede statutorily granted rights. In fact, the contrary is the rule. *City of Wilmington v. Lord*, Del. Super., 340 A.2d 182 (1975). Consequently, there is no authority to support the contention that by virtue of its limited home rule sovereignty Seaford was free to extinguish property rights owned by Delmarva either inside or outside of its borders without compensation.

The second distinction of the *Stillings* case is the nature of the service involved. In its brief, Delmarva argued that garbage collection differs from electrical service in the amount of capital investment involved, and that as a consequence, electrical service involves a different magnitude of rights. While it may be the case that providing electrical power may require a larger investment than trash removal, the difference in the respective rights which sets apart this case is the compulsion on the municipality to provide each service. The government of Winston-Salem was mandated by statute to extend garbage collection to its newly annexed areas in its governmental capacity. To the contrary, no such compulsion appears to exist on Seaford to extend electrical service to new residents. Seaford did not provide electrical service to everyone within one-half mile of its borders in 1961, or to all new residents of Seaford when the territory was annexed in 1981. It apparently was not compelled to do so by the annexation. Thus, these facts distinguish the *Stillings* case.

In summary, the granting authority for Delmarva's franchise was not restricted to only territory outside city limits, as was the Forsyth County authority. Secondly, Seaford has provided electrical service to new citizens at its discretion and did not extend electrical service as one of its

police powers as mandated by the annexation. The *Stillings* case, therefore, does not apply to these facts, and we do not adopt its holding as dispositive of this case.

Seaford's sovereign power to expand its borders is controlled generally by the law on annexation. While annexation affects many property rights, it may not impair vested rights. 2 McQuillin, *Municipal Corporations* § 7.46.40(3d ed.) (1988 Revised Volume). Many courts have held that annexation does not authorize an ouster of a franchisee from the annexed area without compensation. *Tri-County Elec. Ass'n., Inc. v. City of Gillette*, Wyo. Supr., 584 P.2d 995 (1978); *Utility Light & Power Co. v. City of Burley*, Ind. Supr., 445 P.2d 721 (1968); *Franklin Power & Light v. Middle Tenn. Elec. Mem. Corp.*, Tenn. Supr., 434 S.W.2d 829 (1968); *City of Jackson v. Creston Hills, Inc.*, Miss. Supr., 172 So.2d 215 (1965); *Pa. Water Co. v. City of Pittsburgh*, Pa. Supr., 75 A. 945 (1910) (three justices dissenting); *Jersey City H. & P. St. Ry. Co. v. Borough of Garfield*, N.J. Supr., 53 A. 11 (1902). We hold, therefore, that the annexation did not *ipso facto* extinguish Delmarva's franchise rights to serve its existing customers in the annexed territory.

Seaford also argues that a decisive feature of this case is that the two customers chose to change their service to Seaford. In its decision granting summary judgment below, the Superior Court found this to be a significant fact. Seaford's power to extinguish Delmarva's franchise coupled with the customers' voluntary action eliminated any compensatory right that Delmarva may have had in the two accounts. We find this ruling to be contradicted by the public policy as to pioneer utilities as articulated by the Public Service Commission and by prior decisions of this Court.

As summarized above, the Public Service Commission seeks to restrict competition among utilities in order to protect the public convenience and necessity. It has ruled

that customer preference should not control the decision "whether public convenience and necessity requires a competing utility be given the right to serve in another utility's service territory." *In the matter of the Application of Delmarva Power & Light Co. for a Certificate of Public Convenience and Necessity to Provide Electric Service to Mallard Lakes*, Del. P.S.C., Dkt. 84-20, Cross, Hearing Examiner (July 12, 1985), *aff'd* Del. P.S.C. Order No. 2685 (Nov. 5, 1985). In the case of the Dover Air Force Base, the Commission ruled that one customer desiring to change its service was not a sufficient showing of public necessity and convenience to warrant granting a certificate for Delmarva to replace the city of Dover as the provider. *City of Dover v. Del. Power & Light Co, Del.*, Del. P.S.C., 3 P.U.R.3d 181, 192 (1953). While it is the case that Seaford Light and Power Company is not subject to the jurisdiction of these decisions, we deem them to be significant because they express a policy which seeks to prevent chaotic competition among utilities. It is notable that this policy was applied by the Commission to favor the City of Dover, a non-regulated entity, protecting it as the pioneer utility serving the Dover Air Force Base. *Id.* We hold, therefore, that as a matter of policy, customer choice does not play a decisive role in determining the relative rights of providers of electric service.

III.

In Delaware, as stated above, public utilities such as Delmarva are regulated by the Public Service Commission, whether they operate inside or outside the boundaries of municipalities. Their ability to serve customers within municipal borders, however, is additionally subject to the requirement of the consent of the municipality. This Court has described this power of consent to be that of conferring a franchise to a utility to operate within the municipality. *Eastern Shore Pub. Serv. Co. v. Town of Seaford*, Del. Supr., 2 A.2d 265, 268 (1938), *appeal dismissed*, 306

U.S. 616, 59 S.Ct. 483, 83 L.Ed. 1023 (1939). In this case, the Court must address for the first time whether this provision can be applied when a municipality annexes territory in which a public utility has been lawfully authorized to operate prior to the annexation. The language of the statute describes this consent power explicitly as a "condition precedent" to the use of a municipality's roads by a public utility. 26 *Del.C.* § 906(a). A public utility's use of the streets is subject to "regulations and taxation as may be *first* imposed by the corporate authorities of such cites [sic] and towns." 26 *Del.C.* § 906(b) (emphasis added). The unambiguous language of the statute and the particular facts of this case require the conclusion that the consent power possessed by Seaford cannot be applied retroactively so as to extinguish Delmarva's preexisting right to serve its prior customers once the area is annexed to Seaford. It has been established that Delmarva has been lawfully providing service to the area surrounding Seaford pursuant to a state-granted franchise and under the constraints and obligations imposed by its regulation by the Public Service Commission. In 1981 and 1982, Seaford annexed the territory involved in this case, extending its control and domain over these areas accordingly. As described in its Charter, it supplanted its authority for that of the county to regulate and maintain use of the streets and roadways now within its boundaries. 43 Del. Laws c. 184, § 32. There is nothing in the record to indicate that Seaford took any action at all with regard to Delmarva's continued service to customers in the newly annexed areas. If the consent power possessed by Seaford was to have any effect on this situation, it appears to the Court that action taken by Seaford in concert with the annexation would have presented a stronger argument. To the contrary, it appears that Seaford allowed Delmarva to continue serving its prior customers at Seaford's discretion, presumably because it benefitted Seaford at that time. We hold, therefore, that it was not the intent of the General

Assembly by the consent provision to enable a municipality to oust franchisees which were lawfully operating outside the borders of the municipality prior to the annexation without any compensation for such ouster. As is the case with any other property owner in a newly annexed territory, however, Delmarva's franchise is now subject to regulations imposed by Seaford which are reasonably designed for public safety and protection in accordance with its police powers.

Seaford's extension of electrical service to the annexed territories does not appear to be a step mandated by its Charter. On the other hand, Delmarva is obligated not to abandon electrical services without being granted permission from the Commission. 26 *Del.C.* § 203A(c)(1). Seaford cannot use its authority as a governmental unit to place itself in a position where it can pick and choose among Delmarva's lawful customers so as to enhance its opportunities without compensating Delmarva for the taking. The Constitutions of the United States and of Delaware prohibit this. *See City of Los Angeles v. Los Angeles Gas & Elec. Co.*, 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121 (1919). For this reason, the grant of summary judgment by the Superior Court must be reversed, and the case remanded for further proceedings consistent with this opinion.

Upon remand, the court should consider the following matters of law. Seaford was not compelled by its Charter to serve the two customers and, therefore, it is not required by law to continue its service to them. It may return the customers and compensate Delmarva for any damages. If Seaford desires to initiate service within its boundaries, or to communities within one-half mile of its boundaries, to customers who are being served by Delmarva, it must pay Delmarva fair compensation. While this case does not involve new customers, we do not hold here that Seaford must pay Delmarva for new accounts which arise within the annexed territory where they were not already being served by Delmarva. *See Union Rural Elec.*

Assoc., Inc. v. Town of Frederick, Colo. Supr., 670 P.2d 4 (1983).

We take note of the holding of the Superior Court in *City of Newark v. Delmarva Power and Light Co.*, Del. Super., C.A. No. 83C-JL-10, Poppiti, J. (May 21, 1985). In that case Newark sued Delmarva to condemn property such as lines and poles so as to begin electrical service to three customers whose property had been annexed by Newark. The court ruled that while Newark had the authority to condemn the property under its home rule power of eminent domain, the method by which it was valuing the property was erroneous. The court held that in addition to presenting evidence on the value of the tangible assets being taken, Delmarva could argue the value of its franchise rights, including the going concern value of the customers' accounts, the resultant loss in value to its franchise as a whole, and severance damages. *See also 0.089 of an Acre of Land v. State*, Del. Supr., 145 A.2d 76 (1958); *Bd. of Ed. v. 13 Acres of Land*, Del. Super., 131 A.2d 180 (1957); *City of Thibodaux v. La. Power & Light Co.*, 225 F.Supp. 657 (E.D. La. 1963). In this case, the accounts of the Church and the Country Club are the only property involved. No poles, wires, or physical assets of value were taken. Thus, if Delmarva is to be compensated, it is on the basis of the value of its franchise rights alone. Here we have determined that Delmarva was serving these customers as the holder of a non-exclusive franchise, under the compulsion and protection of the Public Service Commission. We hold that this privilege constitutes a valuable right which cannot be taken by Seaford without compensation.

The decision of the Superior Court is REVERSED.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Civil Action Nos. 86C-JA-57 and 87C-FE-118

Delmarva Power and Light Company,
a Delaware Corporation,

Plaintiff,

v.

City of Seaford, a Municipal Corporation
of the State of Delaware,

Defendant.

MEMORANDUM OPINION

Submitted: February 8, 1988
Decided: April 3, 1989

Upon defendant's Motion for Summary Judgment - GRANTED.

Gregory A. Inskip, Esquire, Potter, Anderson and Corroon of Wilmington, Delaware, Dale G. Stoodley, Esquire, Delmarva Power and Light Company of Wilmington, Delaware for the plaintiff.

James A. Fuqua, Jr., Esquire, Solicitor of Seaford, Delaware, Frederick L. Miller, Jr., Esquire and Janice L. Lower, Esquire, Duncan, Weinberg, Miller and Pembroke, P.C. of Washington, D.C. for the defendant.

Martin, Judge

Before the Court is a motion for Summary Judgment pursuant to Superior Court Civil Rule 56 by the defendant, City of Seaford ("Seaford"), seeking summary judgment on an inverse condemnation claim by the plaintiff, Delmarva

Power and Light Company ("Delmarva"). The plaintiff's inverse condemnation claim is based on Seaford's alleged appropriation of two former customers of Delmarva who were serviced in an area that has been annexed to the City of Seaford. For the reasons stated herein, the defendant's motion for summary judgment is GRANTED.

I.

1. Delmarva is a Delaware corporation engaged in the business of selling electric power to wholesale and retail customers. Seaford, is an incorporated city and a municipal corporation of the State of Delaware, operating under a home rule charter. Seaford operates its own electric utility system, primarily for the purpose of selling electricity to private and commercial residents of Seaford.

2. Until December of 1985, Delmarva sold electric power at retail to the Seaford Wesleyan Church and Parsonage ("Church") located at 13 North Front Street. These properties are within Seaford's municipal limits, having been annexed by the City in August of 1981. At the request of the Church in August, 1985, Seaford took steps to provide service to these properties as customers of the City's electric system. The Church, allegedly due to a service dispute, requested that Delmarva cease service to the properties as of that date, December 5, 1985.

3. Until November 10, 1986, Delmarva sold electric power at retail to the Seaford Golf and Country Club ("Country Club") located on West Locust Street. This property was also, annexed to the City of Seaford on January 25, 1982. On May 7, 1986, the Country Club informed Delmarva that it wished to switch service from Delmarva to Seaford. On November 10, 1986, Seaford commenced service to the Country Club and Delmarva ceased service.

4. On January 10, 1986, Delmarva filed a complaint against Seaford (initiating C.A. No. 86C-JA-57) based upon inverse condemnation for former service of electricity to the

Church pursuant to franchises granted to Delmarva by the State of Delaware and its agencies, including the Sussex County Levy Court. Delmarva claims that Seaford "appropriated" the Church as a customer from Delmarva without instituting formal condemnation proceedings. Further, Delmarva claims that Seaford's action was an infringement of Delmarva's franchise rights and amounted to a taking, requiring just compensation under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections Seven and Eight of the Delaware Constitution.

5. On February 11, 1986, Seaford filed a Motion to Dismiss plaintiff's complaint on the basis of improper venue, pursuant to Superior Court Civil Rule 12(b). This Court denied the motion in a decision rendered February 3, 1987.

6. On February 9, 1987, Delmarva filed a second complaint against Seaford (initiating C.A. No. 87C-FE-118) based on the switch in service to the Country Club and making similar allegations to those made in the earlier complaint concerning the Church. On June 5, 1987, the parties jointly filed a Stipulation and Order for Consolidation of Proceedings pursuant to Superior Court Civil Rule 42(a) which the Court ordered.

7. This Court must determine whether summary judgment is an appropriate disposition of the issues herein. The primary substantive issue is whether Seaford is obligated to compensate Delmarva for taking over customers formerly served by Delmarva pursuant to a franchise when the customers have requested a switch in service. The resolution of the following sub-issues will assist the Court: 1) Did Delmarva have a pre-existing franchise right to serve these two customers?; 2) Was this right exclusive?; 3) If not, did there exist a valid, competing franchise?; 4) If a valid competing franchise exists does Seaford owe Delmarva compensation under a takings theory?; 5) If not, may Delmarva rely on the doctrine of prescription? or

6) Alternatively, may Delmarva receive exclusive rights under the Public Service Commission rules and regulations?

II.

Seaford's Motion for Summary Judgment may be granted only if, after a consideration of the evidence in the light most favorable to Delmarva, the Court concludes that there are no material issues of fact present and Seaford is entitled to judgment as a matter of law. *Moore* v. *Sizemore*, Del. Supr., 405 A.2d 679 (1979), *Bradford, Inc.* v. *Travelers Indemnity Co.*, Del. Super., 301 A.2d 519 (1972).

1. The first question is whether or not Delmarva had a pre-existing franchise. The Court is satisfied that Delmarva did possess a franchise to supply and distribute electric power to the properties (i.e., customers), in question. Seaford, however, contends that Delmarva has no franchise claim which would entitle it to compensation for the loss of customers, suggesting that Delmarva possessed, at best, a temporary franchise, subject to the supervening right of Seaford to provide electrical services within its city boundaries. Seaford suggests, therefore, as of the date of annexation of these properties, it held the exclusive right to provide electricity to the Church and Country Club.

The State or a subordinate agency, such as a municipal corporation, acting under legislative authority, may grant a franchise in any terms that it may deem fit, and may annex any lawful conditions respecting its exercise 36 Am. Jur. 2d, Franchises § 24.

Delmarva has a franchise that was granted by the Levy Court of Sussex County.[1] *Town of Seaford* v. *Eastern Shore Public Service Co.*, Del. Ch., 2 A 2d 265 (1938) (Hereinafter "Seaford"). The Supreme Court in Seaford held: "That prior to June 9, 1915 [Delmarva's Predecessor] had a per-

[1] See Levy Court Rulings July 10, 1906 and July 22, 1930. Defendants Exhibits L & M.

petual franchise from the State [which] admits of no doubt" *Id.* at 263.

In *Eastern Shore Public Service Co.* v. *Town of Seaford*, Del. Supr., 2 A 2d 265, 268 (1938) the Supreme Court held that Delmarva's predecessor-in-interest was conferred a perpetual franchise from the State to distribute electricity in Sussex County, outside the limits of Municipalities.

Accordingly, the area in question was within the area to which Delmarva was granted a franchise.

2. Having found that Delmarva had a valid franchise to the area outside the limits of the Municipality, the next question becomes whether or not that right was exclusive. This Court is satisfied that the answer is in the negative.

> There are presumptions against the granting of exclusive rights and against limitations upon the powers of government, and as a general rule a franchise will not be construed as conferring an exclusive right in the absence of an *express* provision to that effect. 36 Am. Jur. 2d Franchises § 32.

One of the most firmly established rules of franchise interpretation states that no franchise will be deemed to be exclusive unless it specifically so states, and nothing including exclusivity, passes by mere implication. *Long Island Water Supply Co.* v. *City of Brooklyn*, 17 Sup. Ct. 718, 166 U.S. 685, 686, 696 (1897); *Pearsall* v. *Great Northern R. C.*, 16 Sup. Ct. 705; 161 U.S. 646, 664 (1896); *Wright* v. *Nagle*, 25 Law Ed. 921, 101 U.S. 791, 796 (1880); ("Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed").

The franchise documents relevant here are devoid of language that could possibly be construed plainly or impliedly as terms of exclusivity.

> " . . . any ambiguity in the terms of the franchise will be resolved against the grantee . . . " 36 Am. Jur. 2d Franchises 33.

Accordingly, Delmarva's rights cannot be deemed as exclusive as a matter of law.

3. Having held that Delmarva's right is not exclusive[2] as a matter of law, the next question becomes whether there exists a valid competing franchise. The answer to this question is in the affirmative.

Where the grant of a franchise is not by its terms exclusive, the grantor is *not* precluded from granting a similar franchise. 36 Am. Jur. 2d Franchises § 54.

Seaford operates under a Home Rule Charter enacted in 1961,[3] as authorized by 22 *Del. C.* § 802. Section 35(G) of that charter provides in pertinent part:

> In the event the City of Seaford should construct or acquire any plant, machinery . . . for the supply of electricity or gas for light, heat or power purposes, authority is hereby granted the City of Seaford to furnish electricity or gas for light, heat or power purposes to the outlying communities provided that this authority shall not

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[2] Delmarva cites this Court's unreported decision in *City of Newark v. Delmarva Power & Light* Del. Super. C.A. No. 83C-JL-10, J. Poppiti, May 21, 1985, as being the controlling law in this jurisdiction. Although, Seaford's argument that this case does not provide precedential value, due to its interlocutory nature is without merit, this Court finds that the *Newark* decision is distinguishable on one fundamental basis. The *Newark* Court never determined whether or not the franchises in that case were exclusive. The controlling law in the case *sub judice* turns on exclusivity; therefore the scope of *Newark*, *supra* is too narrow for the considerations at bar and shed little light for the determination at issue.

[3] The Home Rule Charter was subsequently amended in May of 1977, June 1979 and January 1982, and currently reflects all of those amendments.

> exceed a distance of one-half mile beyond the limits of said City and provided that such extension will not incur indebtedness in excess of the bonded limit of said City and to do all things necessary to carry out this authority.

A Home Rule City is to be considered a sovereign for purposes of municipal functions. *City of Wilmington* v. *Lord*, Del. Super., 340 A.2d 182 (1975). The power of eminent domain is inherent in a sovereignty. *Id.* at 185.

As of 1961 Seaford's Home Rule Charter, granted by the State, entitled it to provide service to customers within its municipality and to extend service to property within one-half mile of the corporate limits. Charter § 32 and § 35(G).

Both the Church and Country Club were located within one-half-mile of the corporate limits as of 1961 and have subsequently become annexed to the City in 1981 and 1982 respectively.

4. Having found that two valid franchises exist, the next question becomes which, if any, franchise controls in order to determine if there was a compensable taking. The Court believes under these facts Seaford's franchise prevails and Delmarva is not entitled to compensation under the guise of a taking.

In *Stillings, et al.* v. *City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984), the North Carolina Supreme Court enunciated the most recent rule in this area. The plaintiffs in three consolidated inverse condemnation actions operated garbage collection services. The plaintiffs were all granted exclusive franchises by the County to perform collection services in designated areas of the County outside the limits of the City of Winston-Salem. The franchises were each for a term of five years. One year after the beginning of the franchise term, the City of Winston-Salem annexed some of the areas served by

the franchises, and began to furnish free solid waste collection services to the residents of the annexed areas, in compliance with state statutory requirements that annexed areas receive the same services and benefits as the original municipality. Plaintiffs sued in inverse condemnation, alleging, *inter alia*, that the actions amounted to a taking of plaintiffs' property without due process of law. 319 S.E. 2d at 238.

The Court framed the issue (one of first impression) as follows: "Does an exclusive solid waste collection franchise granted by a county remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city, pursuant to statutory mandate, begins providing its own garbage collection service?" The Supreme Court answered in the negative, and found that *no* taking had occurred. *Id.* at 239.

The court relied on the rationale that "plaintiffs' franchises would exist only so long as the county had the authority to grant and protect them; they would be valid for only so long as the territory involved was not within the City. Plaintiffs' franchises were subject to the existing statutory right of the City to annex portions of the areas served by plaintiffs. The plaintiffs had no rights which the City was bound to respect." *Id.* at 237. The Court continued:

> By the annexation of the property in questions, the county's franchise terminated and the police power of the City became operative. Just as "[c]orporations which receive franchises take the granted privileges subject to the police power of the state," 36 Am. Jur. 2d Franchises § 7 (1968), plaintiffs similarly received their franchises subject to the police power of the City.

319 S.E. 2d 233 at 237.

Delmarva holds a franchise from Sussex County, which received its grant from the Sussex County Levy Court,

an agency of the State. This grant had been *subject* to the State's power to authorize Seaford, as a municipal corporation, the right to provide electric service to the fullest extent to which the City is authorized by statute.

The Court in *Stillings* also noted that the City of Winston-Salem, as is the case with Seaford, had done nothing to prohibit or prevent the franchisees in that case from providing services to those who wished to continue to be served by them. *Id.* at 238. Similarly, in the cases at bar, service from Seaford was *specifically requested* by the properties at issue.

The North Carolina Supreme Court concluded its decision in *Stillings* by finding that there was no infringement of the franchisees' rights. It held:

> In the case before us, the actions of the City were not of such character as to require compensation. The City did not confiscate any real or personal property of the franchisees. The City has not issued any private franchise, nor has the City directed that any of its new citizens must allow the City to collect the garbage in question. The City did not unlawfully extend governmental service, and it did not directly interfere with the franchisees' property.
>
> The franchisees in this case have no absolute rights with respect to their franchises. All rights are limited by neighboring rights, and when the rights of these franchisees are considered in light of the rights of the public through the City of Winston-Salem, the franchisees' rights are subject to the rights of these others. The City, by exercising its duty, has not impinged upon or violated any of the rights of the franchisees. Furthermore, not every damage to private property by the government is subject to compensation.

> We conclude, then, that plaintiffs have no compensable injury.

319 S.E.2d at 239.

In *Town of Culpeper* v. *VEPCO*, 215 Va. 189, 207 S.E. 2d 864 (1974), the Supreme Court of Virginia held that the certificate of public convenience and necessity held by an electric utility was a franchise right entitling that utility to continue service within an area annexed by a municipality, where it had earlier provided service under the certificate, and where customers wished to continue taking service from the utility. *Culpeper* is clearly distinguishable from the case at bar, primarily, because in Delaware, a certificate of public convenience and necessity is separate and distinct from a franchise, *See Greater Wilmington Transportation Authority* v. *Kline*,[4] Del. Super., 285 A.2d 819 (1971). Secondly, the customers on the properties in the cases at bar chose to be served by Seaford. This case, therefore, is distinguishable.

Accordingly, Delmarva's franchise with respect to the properties at issue was extinguished by the authority granted the City, coupled with the fact that the customers requested to be serviced by the City and to discontinue service from Delmarva.

It is generally accepted that when a governmental agency is not precluded from competing with another franchisee, despite the fact the value of the franchise is diminished or destroyed by such competition such competition

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[4] In *Kline* the Court defined a franchise as "a special privilege conferred by government on individuals, which does not belong to a citizen by common right. It is essential that a franchise should be created by a grant from the sovereign authority." *Kline* at 822. Whereas a certificate, the Court goes on to define, is authorized only for the purpose of promoting the public convenience by means of restricting the number of businesses to the needs of the public . . . [it] provides for the approval or license of the Public Service Commission as a condition precedent to the validity of franchises . . . " *Id.*

does not result in a taking or injury of the franchisee's property without due process of law. *See* Stillings [sic] 319 S.E.2d 233. *Id.* at 238.

Inasmuch as the Court has found that Delmarva enjoyed a franchise, it is not necessary to reach the issue raised regarding prescriptive rights. In other words Delmarva's claim fails not because the Court found no franchise, rather, because it found its franchise was not exclusive.[5] Therefore, the question raised in Delmarva's argument regarding prescription is moot.

6. Finally, the last question becomes does Delmarva enjoy an exclusive franchise by virtue of the Public Service Commission's ("PSC") rules and regulations? The answer with respect to the date at issue is in the negative.

In Delmarva's statement of facts it suggests that it enjoys an exclusive franchise by virtue of 29 *Del. C.* § 203(a). This argument is without merit, due to the requirement for exclusive franchises as outlined in argument II, 2, *supra*.

Accordingly, the statute cited by Delmarva does not apply to Seaford, therefore is without merit.

For the foregoing reasons, the City of Seaford's Motion for Summary Judgment is HEREBY GRANTED.

IT IS SO ORDERED.

Joshua W. Martin, III

JWM,III/mjd

Original to Prothonotary

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[5] The issues raised in this case may be decided in the future by 26 *Del. C.* §203B(g) which was enacted subsequent to the controlling law and dates of this case.

APPENDIX C

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

TO Superior Court of the State of Delaware in and for New Castle County:

GREETINGS:

WHEREAS, in the case of:

C.A. Nos. 86C-Fe-118 [sic] and 86C-JA-57

Delmarva Power & Light Co.

v.

City of Seaford

a certain judgment or order was entered on the 3rd day of April, 1990 [sic], to which reference is hereby made; and

WHEREAS, by appropriate proceedings the judgment or order was duly appealed to this Court, and after consideration has been finally determined, as appears from the opinion or order of this Court filed on May 8, 1989 [sic] a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the judgment or order be and is hereby reversed, with costs, hereby taxed in the sum of Seventy-Five Dollars ($75.00) to be recovered by appellant against appellee with right of execution and the case is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion or order of this Court.

SIGNED, SEALED AND ATTESTED BY:

/S/ Margaret L. Naylor
Clerk of the Supreme Court

Issued May 24, 1990
Supreme Court No. 165, 1989

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Civil Action No. _____

TRIAL BY CONDEMNATION COMMISSIONERS DEMANDED

DELMARVA POWER & LIGHT COMPANY, a Delaware corporation,

Plaintiff,

v.

CITY OF SEAFORD, a municipal corporation of the State of Delaware,

Defendant.

COMPLAINT

The Parties

1. Plaintiff Delmarva Power & Light Company ("Delmarva") is a Delaware corporation engaged in the business, among others, of selling electric power to retail customers.

2. Defendant City of Seaford ("Seaford") is a municipal corporation of the State of Delaware.

Background of the Dispute

3. The Seaford Weslayan [sic] Church and Parsonage (the "Church") are located at 13 North Front Street, within Seaford's present municipal limits.

4. Delmarva has sold electricity to the Church until December 1985 and since well before the land occupied by the Church was annexed by Seaford in August 1981.

5. Delmarva has been the exclusive supplier of electricity to the Church pursuant to franchises granted by the State of Delaware and agencies thereof, including the Sussex County Levy Court.

The Dispute

6. Seaford operates its own electric utility system, primarily for the purpose of selling electricity to private and commercial residents of Seaford.

7. On or about Friday, December 6, 1985, Seaford supplanted Delmarva as the supplier of electricity to the Church.

8. Seaford's appropriation of the Church as a customer is an infringement of Delmarva's franchise rights and is a taking within the meaning of Amendments V and XIV of the United States Constitution and Article I, Sections 7 and 8 of the Delaware Constitution.

9. Under the constitutional provisions cited in paragraph 8 above, Seaford is obligated to pay just compensation to Delmarva for taking and appropriating a customer from Delmarva.

10. Seaford has failed to institute formal condemnation proceedings and has refused to compensate Delmarva for the taking.

WHEREFORE, plaintiff Delmarva prays that:

A. The Court declare that Seaford has taken and appropriated the property of Delmarva and that Seaford is obligated by the federal and state Constitutions to pay just compensation to Delmarva for the taking and appropriation;

B. The Court order that a trial be held pursuant to 10 Del.C. §6108 for the purpose of determining the compensation payable by Seaford to Delmarva; and

C. The Court grant Delmarva such further relief as may be appropriate, including its costs in this action.

POTTER ANDERSON & CORROON

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Attorneys for Plaintiff
Delmarva Power & Light
Company

Dated: January 10, 1986

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Civil Action No. _____

TRIAL BY CONDEMNATION COMMISSIONERS DEMANDED

DELMARVA POWER & LIGHT COMPANY, a Delaware corporation,

Plaintiff,

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CITY OF SEAFORD, a municipal corporation of the State of Delaware,

Defendant.

COMPLAINT

The Parties

1. Plaintiff Delmarva Power & Light Company ("Delmarva") is a Delaware corporation engaged in the business, among others, of selling electric power to retail customers.

2. Defendant City of Seaford ("Seaford") is a municipal corporation of the State of Delaware.

Background of the Dispute

3. Seaford Golf and Country Club (the "Country Club") is located on West Locust Street, within Seaford's present municipal limits.

4. Delmarva has sold electricity to the Country Club until November 10, 1986 and since well before the land

occupied by the Country Club was annexed by Seaford on January 25, 1982.

5. Delmarva has been the exclusive supplier of electricity to the Country Club pursuant to franchises granted by the State of Delaware and agencies thereof, including Sussex County Levy Court.

The Dispute

6. Seaford operates its own electric utility system, primarily for the purpose of selling electricity to private and commercial residents of Seaford.

7. On or about November 10, 1986, Seaford supplanted Delmarva as the supplier of electricity to the Country Club.

8. Seaford's appropriation of the Country Club as a customer is an infringement of Delmarva's franchise rights and is a taking within the meaning of Amendments V and XIV of the United States Constitution and Article I, Sections 7 and 8 of the Delaware Constitution.

9. Under the constitutional provisions cited in paragraph 8 above, Seaford is obligated to pay just compensation to Delmarva for taking and appropriating a commercial account from Delmarva.

10. Seaford has failed to institute formal condemnation proceedings and has refused to compensate Delmarva for the taking.

WHEREFORE, plaintiff Delmarva prays that:

A. The Court declare that Seaford has taken and appropriated the property of Delmarva and that Seaford is obligated by the federal and state Constitutions to pay just compensation to Delmarva for the taking and appropriation;

B. The Court order that the trial be held pursuant to 10 Del.C. §6108 for the purpose of determining the compensation payable by Seaford to Delmarva; and

C. The Court grant Delmarva such further relief as may be appropriate, including its costs in this action.

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Dated: January 21, 1987

(2)

No. 90-234

Supreme Court, U.S.
FILED
SEP 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CITY OF SEAFORD, DELAWARE,
Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF IN OPPOSITION AND APPENDIX

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 24.2, respondent Delmarva Power & Light Company ("Delmarva") restates the questions presented which are inaccurately stated in the petition of the City of Seaford, Delaware ("Seaford") for a writ of certiorari (P i).[1]

1. Is the order of the Delaware Supreme Court, reinstating Delmarva's claim which had been dismissed on summary judgment and remanding the case for trial of the issue of just compensation, an interlocutory order rather than a "final" judgment within the meaning of 28 U.S.C. § 1257(a)?

2. Pursuant to Delaware statutes, as implemented by Sussex County, Delaware ordinances, does Delmarva enjoy a proprietary franchise right to distribute electricity to retail customers in the County?

3. If Seaford takes over Delmarva's property right to distribute electricity to certain customers, is Seaford required to pay just compensation by the United States Constitution (Amendments V and XIV) and independently by the Delaware Constitution of 1897 (Article I, §§ 7 and 8)?

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1. Throughout this brief in opposition, pages in the petition for a writ of certiorari and petitioner's appendix are cited as "P—," or "P—a." Delmarva's appendix attached hereto is cited as "—b."

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RULE 29.1 LISTING OF PARENT COMPANIES AND SUBSIDIARIES

Delmarva Power & Light Company is publicly held and does not have a parent corporation. All subsidiaries of Delmarva Power & Light Company are wholly owned by it.

CONSTITUTIONAL PROVISIONS, DELAWARE STATUTES AND SUSSEX COUNTY, DELAWARE ORDINANCES INVOLVED

The case raises a threshold jurisdictional issue of the absence of finality under 28 U.S.C. § 1257(a).

This case was brought under the just compensation and due process clauses of the United States Constitution, U.S. CONST. amend. V and amend. XIV, § 1, and under parallel but independent provisions of the Delaware Constitution of 1897, DEL. CONST. art. I, §§ 7 and 8.

The controversy in the Delaware Courts did not concern the interpretation of the federal or state constitutional provisions. Rather, the parties joined issue on the question whether Delmarva enjoys a franchise by virtue of (a) statutory enactments of the State of Delaware, as follows: 26 Del. C. §§ 102(1) and (2), 202(a), 203A(a), 203A(c)(i), 204, 906 and 907; and (b) Sussex County, Delaware franchise grants dated July 10, 1900 and July 22, 1930.

Pursuant to Supreme Court Rule 24.1(f), the text of each of the foregoing provisions is set forth in the Appendix attached to this Brief.

STATEMENT OF THE CASE

With one important exception, Delmarva accepts Seaford's statement of the case (P 3-5).

The Delaware Supreme Court did not "agree" that "Delmarva's franchise was nonexclusive," as asserted in the petition (P 4; *see also* P 2, 5, 6, 9 and 10). What the Delaware Supreme Court actually held was (1) that Delmarva's *initial* (1900 and 1930) franchise grants were "nonexclusive" (P 17a); (2) that Delmarva later became a "regulated monopoly" pursuant to a State policy to "protect the pioneer utility" from competition (P 14a-15a); and (3) that the *combination* of Delmarva's

initially nonexclusive franchise and later regulatory protection from competition "constitutes a property right as to customers served by Delmarva, which cannot be taken without due process" (P 18a; 28a).

Indeed, the Delaware Supreme Court found that outside Seaford, "Delmarva enjoys an exclusive right to serve . . ." (P 18a). Delmarva's franchise is "nonexclusive" as against Seaford only in the sense that as an unregulated governmental entity, Seaford has the power to serve new locations within its municipal boundaries and even to take over Delmarva customers located there. To take established customers, however, is an infringement of Delmarva's franchise for which Seaford must pay just compensation (P 18a, 28a). The just compensation payable by Seaford is yet to be determined in the Delaware trial court.

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to review the order of the Delaware Supreme Court because that order is not "final" within the meaning of 28 U.S.C. §1257(a). The case remains pending in the trial court where the just compensation payable by Seaford to Delmarva will be assessed.

2. The Court lacks jurisdiction to review the issue decided by the Delaware Supreme Court, which is whether, under Delaware law, Delmarva enjoys proprietary franchise rights to distribute electricity to Sussex County, Delaware customers. This Court has long recognized that such property law questions are a matter of state law, and Seaford conceded below that Delaware law controls the case at hand.

3. The holding of the Delaware Supreme Court that Seaford must pay just compensation for taking Delmarva's property is supported independently by the Delaware constitution, and in any event is correct as a matter of settled federal constitutional law.

ARGUMENT

I. THE JUDGMENT BELOW WAS NOT A "FINAL" JUDGMENT AND THEREFORE IT IS NOT REVIEWABLE BY WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1257(a)

The Court has jurisdiction to review, by writ of certiorari, only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . .," 28 U.S.C. §1257(a); *O'Dell v. Espinoza,* 456 U.S. 430 (1982).

In the opinion and order sought to be reviewed by the petition, the Delaware Supreme Court ruled that Seaford has taken Delmarva's property, and remanded the case for trial of the compensation payable by Seaford on a theory of inverse condemnation (P 18a, 27a-28a). This clearly was not a "final" decision within the meaning of 28 U.S.C. §1257(a):

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.,* 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 127, 65 S.Ct. 1480, 89 L.Ed. 2092 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores,*

Inc., 414 U.S. 156, 163, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973).

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 632 (1981); *see also Catlin v. United States,* 324 U.S. 229, 233-34 (1945) (federal and state condemnation rulings are not reviewable "in advance of determination of just compensation"); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 n.6 (1975) (same); *O'Dell v. Espinoza, supra,* 456 U.S. 430 (state supreme court decision remanding case for trial was not final).

There is thus no basis for Seaford's contention that the judgment below was final or its citation of *Cox Broadcasting* in support of that claim (P 9-10). Like the *San Diego Gas & Electric* case, *Cox Broadcasting* makes clear (1) that just compensation is a substantial federal issue and (2) that where as here the compensation issue is yet to be tried, the judgment below is not "final" as required by 28 U.S.C. §1257(a). 420 U.S. at 477 n.6.

II. THE COURT LACKS JURISDICTION TO REVIEW THE DECISION BELOW, WHICH CONSISTS OF DELAWARE LAW DETERMINATIONS BY THE DELAWARE SUPREME COURT

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). The Court is bound to accept the interpretation of a state's law by the highest court of the State, *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n,* 426 U.S. 482, 488 (1976). The Court has "no authority to review state determinations of purely state law," *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 387 (1986).

The decision below turned upon the state law determination that Delaware statutes and County ordinances confer a proprietary franchise upon Delmarva which

Seaford infringed when it appropriated two of Delmarva's customers (P 17a-18a, 28a). In other words, the controversy below was whether Delmarva enjoys a property right under Delaware law, not whether the federal and Delaware constitutions protect property rights that do exist under state law. Seaford's contention that the decision below "directly conflicts with a number of rulings of this Court and of the United States courts of appeals" (P 5) is wrong.[2] Even if there were a split of authority, the decision of the Delaware Supreme Court would be dispositive of the Delaware law issues here presented.[3]

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2. The federal authorities relied upon by Seaford hold that the owner of a non-exclusive franchise is not entitled to an injunction against the construction and operation of a competing plant by a governmental entity. *See Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118 (1939), *overruled Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Durham v. North Carolina,* 395 F.2d 58 (4th Cir. 1968); and the further citations at P 6-7, n.3.

In this case Delmarva does *not* seek to preclude Seaford from owning and operating its own electric system. It simply seeks to be compensated for the loss of two customers which it had the proprietary right to serve under Delaware law (pp. 1-2, *supra*).

3. The decision below does not rest upon some idiosyncratic " 'Delaware rule,' " as Seaford implies (P 9). While some variation in conceptualization is to be expected in matters controlled by state law, state courts from around the country recognize that state regulation confers a vested property right upon an established company – protecting it against all competition – whether termed an "exclusive franchise" or by some other name. Thus a previous decision of the Delaware Supreme Court described a regulated utility as "a legalized monopoly." *Diamond State Telephone Co. v. Public Service Commission,* 367 A.2d 644, 646 (Del. 1976); *accord, City of Tucson v. El Rio Water Co.,* 101 Ariz. 49, 415 P.2d 872, 875 (1966) (a regulatory certificate of convenience and necessity "creates a monopoly" whose value must be paid by a city in a condemnation action); *Sende Vista Water Co. v. City of Phoenix,* 127 Ariz. 42, 617 P.2d 1158, 1161 (Ct. App. 1980) (certificate constitutes property which city should acquire before providing service in certificated area); *Summers Appliance Co. v. George's Gas*

Seaford's contention that the decision below turned solely upon the federal constitution and not upon Delaware law (P 7) is belied by its own arguments to the Delaware courts that were framed entirely in terms of Delaware law (*see* Appendix points II and III at 11b – 17b). Seaford concluded its opening brief in the Delaware Superior Court as follows (13b):

> The only issue is the legal issue of whether DP&L has a valid or compensable franchise right to serve the properties in question. By the operation of applicable provisions of the Delaware Constitution and Delaware statutory law, and pursuant to case law precedent established in Delaware courts, it is clear

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NOTES *(Continued)*

Co., 244 Ark. 113, 424 S.W.2d 171, 173 (1968) (regulated utilities enjoy "exclusive privileges" including franchises and protection from competition); *Public Service Co. of Colorado v. Public Utilities Commission*, 765 P.2d 1015, 1021 (Colo. 1988) ("This exclusive right to serve an area is a property right which cannot be affected except by due process of law"); *City of Greeley v. Poudre Valley Rural Electric Ass'n, Inc.*, 744 P.2d 739, 745 (Colo. 1987) *appeal dismissed*, 485 U.S. 949 (1988) (same); *Cambridge Telephone Co. v. Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576, 579 (1985) (same); *Bear Creek Water Ass'n, Inc. v. Town of Madison*, 416 So.2d 399, 400 (Miss. 1982) ("the certificate of public convenience and necessity has value for which just compensation must be made. . . ."); *Mississippi Power & Light Co. v. City of Clarksdale*, 288 So.2d 9, 11 (Miss. 1973) ("grandfather" certificate is "an exclusive right to operate in a designated area" and as such, a valuable franchise right which must be condemned and paid for by city wishing to take over service); *City of Jackson v. Creston Hills, Inc.*, 252 Miss. 564, 172 So.2d 215, 220 (1965) ("grandfather" certificate "is a valuable right, entitled to protection by the courts" against municipal competition); *Town of Culpeper v. Virginia Electric & Power Co.*, 215 Va. 189, 207 S.E.2d 864, 867-68 (1974) ("The weight of authority, and the principle with which we agree, is that a certificate of public convenience and necessity is a franchise and is a property right. As such it is entitled to the protection of the courts."); *Tri-County Electric Ass'n. Inc. City of Gillette*, 584 P.2d 995, 1001, n.9 (Wyo. 1978) (noting that certificate is a franchise).

> that DP&L has no valid franchise rights whatsoever to serve these properties. Having no exclusive franchise rights, and having claimed no other compensable interest in its Complaints in these proceedings, DP&L makes no claim for which it may be compensated.

Seaford similarly relied on Delaware law in concluding its brief in the Delaware Supreme Court (17b):

> DP&L has failed to show that the opinion and judgment below were in error in the law relied upon for the Superior Court's decision, or that it has any compensable right to serve the properties at issue under the law of this state.

In the proceedings below, Seaford clearly was correct to approach the franchise question as a question of Delaware property law.[4] Just as clearly, Seaford is wrong to seek this Court's review of the Delaware Supreme Court's determination of the Delaware property law question.

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4. *See Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330 (9th Cir. 1977) ("In determining what property rights exist and therefore are subject to taking under the Fifth Amendment, federal courts look to local state law"); *Bishop v. Wood,* 426 U.S. 341, 344 (1976) (property interests are created by state law, not by the United States Constitution); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (same); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980) ("as a general proposition . . . the United States, as opposed to the several States, [is not] possessed of residual authority that enables it to define 'property' in the first instance").

Even the authority relied upon most strenuously by Seaford (P 4, 6-7) recognized that "[w]hether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy," not federal constitutional law. *Tennessee Electric Co., supra,* 306 U.S. at 141.

III. THE DELAWARE STATE CONSTITUTION ALSO PROVIDES AN INDEPENDENT STATE GROUND FOR THE RESULT REACHED BELOW

In the proceedings below, Seaford disputed the existence and nature of Delmarva's franchise. It did not dispute the settled law that the Fifth and Fourteenth Amendments together require that a municipality pay just compensation for taking or displacing a state-franchised utility. *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 39-40 (1919).

Even if Seaford had fairly presented federal constitutional arguments to the courts below and the Delaware Supreme Court had somehow misinterpreted the federal constitution, the decision below still would have an adequate state ground in the Delaware Constitution of 1897, which prohibits deprivation of "property, unless . . . by the law of the land" (art. I, § 7), and which further provides that no "man's property [shall] be taken or applied to public use . . . without compensation being made," art. I, § 8. Seaford's contention that the state provisions "are construed to provide the same rights and guarantees" as the federal ones (P 7-8) does not matter. Where the decision of the state supreme court is based upon parallel provisions of the federal and state constitutions, certiorari should be denied on the basis "that the judgment below rests upon an adequate state ground." *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, 429 U.S. 889 (1976) and *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc.*, 170 Conn. 155, 365 A.2d 393, 395, *cert. denied*, 429 U.S. 889 (1976).

Seaford contends that the Delaware Supreme Court "conceived of its ruling" as based upon the federal constitution alone and not as "independently founded on the Delaware constitution" (P 7). That contention is belied by express language of the opinion below (*see, e.g.*, P 27a), and by the very opinion of this Court cited by

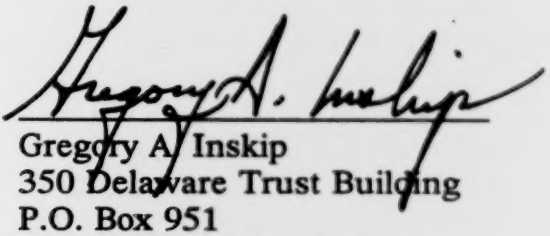
Seaford in support of its contention, *Michigan v. Long*, 463 U.S. 1032 (1983). *Long* indicated that state law might not provide an adequate and independent ground for a decision "when it fairly appears that the state court rested its decision primarily on federal law," 463 U.S. 1042.

Seaford stands *Long* on its head, arguing that because the Delaware Supreme Court distinguished and did *not* follow the *Tennessee Valley Authority* case, it somehow felt "required" to construe the state due process and just compensation clauses consistently with the federal ones (P 7). In fact, at that juncture of its opinion, the court below was not focusing on either the state or the federal constitutional provisions. Rather, the Delaware Supreme Court concluded, after respectful consideration, that the *Tennessee Valley Authority* decision was primarily procedural and factual and not "authority for defining the [Delaware law] property rights of the parties in this case." (P 17a). Those Delaware law property rights on the one hand, and the Delaware Constitution on the other, each provide adequate and independent grounds for the result below, and for the denial of the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the City of Seaford's petition for a writ of certiorari to review the decision of the Supreme Court of the State of Delaware.

Respectfully submitted,



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APPENDIX

I. RULE 24.1(f) LEGAL PROVISIONS

A. 28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

B. United States Constitutional Provisions

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Provisions of the Constitution of the State of Delaware Adopted 1897

Article I, § 7. Procedural rights in criminal prosecutions; jury trial; self-incrimination; deprivation of life, liberty or property.

Section 7. In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, unless by the judgment of his peers or by the law of the land.

Article I, § 8. Prosecution by indictment or information; double jeopardy; just compensation for property.

Section 8. No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same offense twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made.

D. Provisions of the Public Utilities Act of 1974 of the State of Delaware, Title 26 of the Delaware Code

§ 102. Definitions.

As used in this title, unless the context otherwise requires:

(1) "Commission" means the Public Service Commission.

(2) "Public utility" includes every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees, or receivers appointed by any court whatsoever, that now operates or hereafter may operate, within this State, any steam, manufactured gas, natural gas, electric light, heat, power, water, telephone, excluding telephone service provided by cellular technology, or by domestic public land mobile radio service or heating oil (for residential consumption directly to residences by means of a pipeline) service, system, plant or equipment, for public use.

• • •

§ 201. General jurisdiction and powers.

(a) The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

• • •

§ 202. Limitations on jurisdiction of Commission.

(a) The Commission shall have no supervision or regulation over any public utility or over the rates, property, property rights, equipment, facilities, service territories or franchises of any public utility that is municipally owned or any municipal electric company formed pursuant to Chapter 13 of Title 22.

* * *

§ 203A. Certificate of public convenience and necessity; abandonment or discontinuance of business, operations or service.

(a) (1) Subject to the provisions of subsection (b) of this section and §§ 102, 201 and 202 of this title, no individual, copartnership, association, corporation, joint stock company, agency or department of the State, cooperative, or the lessees, trustees or receivers thereof, shall begin the business of a public utility nor shall any public utility begin any extension of its business or operations without having first obtained from the Commission a certificate that the present or future public convenience and necessity requires or will require the operation of such business or extension.

(2) This section shall not be construed to require any public utility to secure such a certificate for any extension within the perimeter of any territory already served by it.

(3) The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity.

* * *

(c) (1) No public utility shall abandon or discontinue, in whole or in part, any business, operations or services provided under a certificate of public convenience and necessity or otherwise which are subject to jurisdiction

of the Commission without first having received Commission approval for such abandonment or discontinuance.

(2) Applications for such approval shall be made to the Commission in writing, verified by oath or affirmation and be in such form and contain such information as the Commission may from time to time require.

(3) The Commission shall approve any such application when it finds that the utility has met its burden of proving that the abandonment or discontinuance is reasonable, necessary and not unduly disruptive to the present or future public convenience and necessity.

(4) The Commission may make such investigation and hold such hearings in the matter as it deems necessary or appropriate, and may attach reasonable terms and conditions to the granting of such approval.

(5) If, within 60 days after the filing of such application, the Commission has not acted concerning the application, it shall be deemed to have been approved. The Commission may, within such 60-day period, set the matter for hearing, in which event the Commission shall render a decision concerning said application within 7 months from the date such application was filed or the application shall be deemed in fact and law to be approved, unless within said 7-month period the Commission for good cause shown shall enter an order extending the period for decision for a further reasonable time not to exceed 120 days.

(6) Nothing contained in this section shall be construed to require formal application for approval of abandonment or discontinuance of service to any individual customer or customer class where the basis for such abandonment or discontinuance is nonpayment of bills or other violation of the utility's rules, regulations and tariffs.

(7) The Commission may seek injunctive relief in the Court of Chancery to prevent any abandonment in violation of this subsection and in such proceeding shall

not be required to post security for any temporary or preliminary injunction. (47 Del. Laws, c. 254, § 8; 48 Del. Laws, c. 371, § 13; 26 Del. C. 1953, § 162; 53 Del. Laws, c. 364, §§ 1-4; 54 Del. Laws, c. 38, § 1; 57 Del. Laws, c. 665, §§ 2, 3; 59 Del. Laws, c. 397, § 1; 64 Del. Laws, c. 150, § 1; 66 Del. Laws, c. 50, § 1.)

§ 204. Extension of utilities' facilities.

The Commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where, in the judgment of the Commission, such extension is reasonable and practicable and will furnish sufficient revenue to justify the construction and maintenance of the same, and when the financial condition of the public utility reasonably warrants the original expenditures required in order to make and operate such extension; provided, however, the Commission shall consider, among other things, the size and amount of additional and potential customers to be served, whether the new customers will contribute to any capital expenditures required by the extension and whether the public utility must borrow funds to provide the extension of service. (47 Del. Laws, c. 254, § 4; 26 Del. C. 1953, § 136; 59 Del. Laws, c. 397, § 1.)

§ 906. Powers and duties of electric utility corporations; regulation of use of public roads, streets, etc.

(a) Every corporation organized under Chapter 1 of Title 8 for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, in addition to the powers conferred upon corporations generally, may use the public roads, highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures. The consent of the council, town commissioners or other persons having control over the public roads, highways, streets, avenues and alleys of the city, town and district

in or upon which the posts or poles are to be erected shall first, and as a condition precedent, be obtained.

(b) No posts or poles shall be erected in any street of any city or incorporated town except in those streets which are designated by the authorities thereof and then only in such place and manner as is thus designated, and the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the streets, highways and roads. The use of the public streets in any of the cities and incorporated towns of this State shall be subject to such regulations and taxation as may be first imposed by the corporate authorities of such cities and towns.

(c) No posts or poles shall be erected upon the soil or property of any person without first obtaining the consent in writing of the owner of the soil or property.

(d) Any wire crossing a railroad shall not be at a less elevation than 23 feet. (21 Del. Laws, c. 273, § 101; 22 Del. Laws, c. 166, § 17; Code 1915, § 2044; Code 1935, § 2188; 26 Del. C. 1953, § 906.)

§ 907. Laying pipes, conduits or wires by electric utility corporations.

Every corporation mentioned in § 906 of this title may lay pipes, conduits or wires beneath the public roads, highways, streets, avenues and alleys as it deems necessary. The pipes, conduits and wires shall be laid at least 2 feet below the surface of the same and shall not in any way unnecessarily obstruct or interfere with public travel or damage public or private property. No public streets shall be opened for such purpose without the consent of the counsel of any city, or the town commissioners of any incorporated town, or other persons having control over the public roads, highways, streets, avenues and alleys. Such use of the public streets in any of the cities and towns of this State shall be subject to such regulations, taxation and restrictions as may be first imposed by the corporate authorities of such

cities and towns. (21 Del. Laws, c. 273, § 102; 22 Del. Laws, c. 166, § 17; Code 1915, § 2045; Code 1935, § 2189; 26 Del. C. 1953, § 907; 57 Del. Laws, c. 446.)

E. Ordinances of the Levy Court of Sussex County, State of Delaware

Ordinance of July 10, 1900

Be it resolved by the Levy Court of Sussex County at the July Session A.D. 1900, that THE DELAWARE ELECTRIC COMPANY its successors and assigns, be and the same is hereby authorized to use the Streets and Highways of Sussex County for the purposes of erecting poles for carrying wires, and the placing of wires on the same, for transmitting electricity for light, heat and power, or for building and maintaining of subways for the transmitting electricity for light, heat and power.

PROVIDED that all poles placed by the said Company on the Streets or Highways of the said County shall be placed or set on the extreme side limit of the said Streets or Highway and in all cases where the wires of the said Company shall cross the said Streets or Highways they shall be placed at such a distance from the ground as not to interfere with or hinder the public in the use of the said Streets or Highways.

AND PROVIDED FURTHER that all subways built by said Company uponnthe [sic] Streets or Highways of the said County shall be built under and along the extreme side limit of the said Streets or Highways, and in all cases where the wires of said Company cross the said Streets or Highways the said Subways shall be run directly across said Streets or Highways and at such depth that the same shall not interfere with or hinder the public in the use of said Streets or Highways.

July 10, 1900

Ordinance of July 22, 1930

BE IT RESOLVED by the Levy Court of Sussex County, Delaware, that the right, revocable at the pleasure of the Levy Court, to erect and maintain poles and to string wires thereon, be and the same hereby is granted to and vested in Eastern Shore Public Service Company, a corporation of the State of Delaware, its successors and assigns, over and along all roads and highways within the limits of Sussex County over which the said Levy Court of Sussex County has jurisdiction, and provided that all such poles and wires be erected and located on the extreme side of such County Roads so as in nowise to interfere with the free and unimpeded use of said County roads for vehicular or other traffic.

BE IT FURTHER RESOLVED that whenever said Eastern Shore Public Service Company desires or proposes to erect poles and string its wires along any of the County roads under the jurisdiction of the Levy Court of Sussex County, notice of its intention so to erect poles and string wires shall be given to the County Engineer of Sussex County, and all poles so to be erected on and along said County roads shall be erected under the supervision and according to the instructions of the County Engineer of Sussex County.

I, John S. Cooper, Clerk of the Peace in and for the County of Sussex and State of Delaware, and as such Clerk of the Levy Court of Sussex County, hereby certify that attached hereto is a true and correct copy of a franchise granted unto Eastern Shore Public Service Company by said Levy Court of Sussex County on the twenty-second day of July, A.D. 1930.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Levy Court this twenty-second day of July, A.D. 1930.

/s/ John S. Cooper

Clerk of the Peace and
Clerk of the Levy Court of
Sussex County, Delaware

II. EXCERPTS FROM SEAFORD'S MEMORANDUM OF POINTS AND AUTHORITIES, DATED OCTOBER 23, 1987, IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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[p. 68] CONCLUSION

In these consolidated proceedings, Delmarva Power & Light Company seeks compensation in inverse condemnation for the alleged taking by Seaford of Delmarva's alleged franchise rights to supply electricity to certain properties located within the boundaries of the City of Seaford. The factual circumstances underlying these actions are simple, and there are no material facts in dispute. The only issue is the legal issue of whether DP&L has a valid or compensable franchise right to serve the properties in question. By the operation of applicable provisions of the Delaware Constitution and Delaware statutory law, [p. 69] and pursuant to case law precedent established in Delaware courts, it is clear that DP&L has no valid franchise rights whatsoever to serve these properties. Having no exclusive franchise rights, and having claimed no other compensable interest in its Complaints in these proceedings, DP&L makes no claim for which it may be compensated. Pursuant to Rule 56 of the rules of Civil Procedure for the Superior Court of the State of Delaware, and pursuant to recent United States Supreme Court precedent, Seaford has herein demonstrated that DP&L has presented no evidence of a factual dispute, and no evidence that can support its case. Therefore, these actions are appropriate for summary judgment. The weight of legal precedent demonstrates that summary judgment must be entered in favor of defendant City of Seaford in these actions.

PRAYER

WHEREFORE, the City of Seaford hereby respectfully prays that summary judgment be entered in its favor in these proceedings, and against plaintiff Delmarva Power & Light Company, and that these consolidated cases be dismissed with prejudice.

Respectfully submitted,
/s/ James A. Fuqua, Jr.

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Dated: October 23, 1987

III. EXCERPTS FROM ANSWERING BRIEF OF CITY OF SEAFORD, DATED JULY 7, 1989, IN THE SUPREME COURT OF THE STATE OF DELAWARE

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[p. 35] CONCLUSION

DP&L has failed to show that the opinion and judgment below were in error in the law relied upon for the Superior Court's decision, or that it has any compensable right to serve the properties at issue under the law of this state. Therefore, for the reasons stated herein, the order below granting summary judgment against Delmarva must be affirmed.

Respectfully submitted,

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(3)

No. 90-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SEAFORD, DELAWARE,

Petitioner,

v.

DELMARVA POWER & LIGHT COMPANY,

Respondent.

Petitioner's Reply Memorandum
In Support of
Petition for a Writ of Certiorari to the
Supreme Court of the State of Delaware

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IN THE

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CITY OF SEAFORD, DELAWARE,

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DELMARVA POWER & LIGHT COMPANY,

Respondent.

Petitioner's Reply Memorandum in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

---

No matter how one comes at it, the decision below constitutes a holding by the Delaware Supreme Court that a private electric utility, possessing a nonexclusive franchise to serve certain customers, is entitled to compensation under the fifth and fourteenth amendments of the Constitution of the United States for the taking of the patronage of such customers, when a municipal electric utility properly assumes the provision of service to them. This holding squarely conflicts with a number of decisions of this Court and of the United States courts of appeals.

Citing, among other authorities, *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 577 (1904), the principle was encapsulated by the United States Court of Appeals for the Fourth Circuit as follows:

> Further, it has long been settled that the holder of a non-exclusive franchise has no monopoly, and cannot complain of competition from a publicly-created utility system. Phrased another way, the creation by a State of a competing public utility does not amount to a "taking" compensable under the fourteenth amendment.

Durham v. North Carolina, 395 F.2d 58, 60 (1968). In accord, *see* cases cited Pet. 6 n.3.

While it is true that a state is free to define property about as it chooses, it may not, by defining as property an interest of a kind this Court has determined not to be protected by the fifth amendment against uncompensated taking, compel a subdivision of the state, *as a matter of federal constitutional law*, to compensate the former owner upon a taking of such an interest. In other words, a state court may not mandate the payment of compensation under the fifth and fourteenth amendments for the taking of an interest of a kind this Court has determined is not protected under the federal Constitution. The corollary is that, by withholding the appellation of property from interests of sorts this Court recognizes as entitled to protection under the fifth and fourteenth amendments, a state may not commission the taking of such interests without compensation. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980).

Delmarva's argument that the judgment below is not final within the intendment of 28 U.S.C. § 1257 (1982) is based on the proposition that, where the amount of compensation remains to be determined,

judgments in eminent domain proceedings are usually not final. Respond's Br. 3-4. While Delmarva accurately recites the general rule, it wholly ignores the reasons for the rule. These are, of course, that in many situations the determination of compensation can take on constitutional dimensions and that valuation proceedings can raise additional constitutional questions. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 n.6 (1975).

It is worthy of note that Delmarva does not traverse Seaford's statements that here there is no possibility that the valuation proceedings remaining to be held will raise any federal issues, constitutional or other, and that, regardless of the outcome of the valuation proceedings, the issue of the compensability of Delmarva's nonexclusive franchise under the federal Constitution cannot again be brought before the Delaware Supreme Court. Thus, in this case, the reasons for the general rule - that a judgment in a condemnation case is not ordinarily final if the amount of compensation remains to be determined - are all inapplicable. The judgment below is final within the intendment of 28 U.S.C. § 1257, and the error of constitutional law made by the court below cannot be corrected if it is not corrected now.

If Delmarva had pleaded simply that, under the law of Delaware, it is entitled to compensation for Seaford's interference with its nonexclusive franchise, and if the court below had confined itself simply to ruling that under state law Delmarva is so entitled, we would not be here. But Delmarva specifically pleaded its entitlement to compensation for interference with its nonexclusive franchise under the fifth and fourteenth amendments of the Constitution of the United States,

Pet. App. 42a, 45a, and, on that basis, the court below held in favor of Delmarva's entitlement. *Id.* 27a. To do so, the Delaware court found it necessary to deny continuing vitality to one of the several decisions of this Court that establish that the federal Constitution does not require compensation for the taking of a nonexclusive franchise. *Id.* 17a.

There is no question that, at least, the state court decision is "interwoven with federal law, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (revising the standards for determining the adequacy and independence of state grounds).

Conclusion

The holding of the court below, that the federal Constitution requires the payment of compensation for interference by competition with a utility's nonexclusive franchise to serve certain customers, conflicts with a number of decisions of this and other federal courts. This holding constitutes a final judgement within the meaning of 28 U.S.C. § 1257 that can be expected to cause trouble and confusion until corrected by this Court. A writ of certiorari should be granted.

Respectfully submitted,

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